Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1996

GARY CHAVEZ,

Petitioner,

vs.

CITY OF ARVADA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

EVA CAMACHO WOODARD
Counsel of Record
LAW OFFICE OF
EVA CAMACHO WOODARD
Attorney for Petitioner
200 Union Boulevard, Suite 306
Union Plaza
Lakewood, Colorado 80228-1831
(303) 763-5770

9708
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

87 pp

QUESTIONS PRESENTED

I. Where the evidence for causation under 42 U.S.C. § 2000e-3(a) consists of direct testimony and other important factors that show retaliation which the district court properly credits, can the Tenth Circuit reverse the district court based on temporal proximity?

II. Where the Tenth Circuit finds insufficient direct evidence of retaliation to uphold a decision in favor of an employee, can the Tenth Circuit deny the employee the right to have his direct evidence re-evaluated by the district court, along with all other evidence in the case, to determine if there is preponderant evidence of pretext under *McDonnell Douglas v. Green*, 411 U.S. 792 (1973)?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgement is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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Petitioner, Gary Chavez, respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Tenth Circuit

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 88 F. 3d 861 (1996) *rehearing denied* September 4, 1996 and is reproduced in the Appendix filed herewith ("App.") at 3a-16a. The district court's unreported opinions, judgment, and amended judgement in this case are reproduced at 17a, 19a, and 21a-60a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgement and denial of rehearing *en banc* on September 4, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The pertinent provision of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-3(a), ("The anti-retaliation clause of Title VII") is set forth below:

Sec. 2000e-3 Other unlawful employment practices

> (a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings
>
> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency,

> or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

In 1977, Gary Chavez, a Hispanic, filed a claim of National Origin (Hispanic) discrimination against his employer, the City of Arvada ("City") (App. E, 37a) and his supervisor, Street Superintendent Kelly Schultz (App. E, 23a).

On November 18, 1987, Mr. Chavez competed for a Crew Supervisor position (App. E, 23a). The 1987 promotional process included a preliminary oral exam before a panel, a written exam, and then referral and an interview with the Appointing Authority, Mr. Ronald Culbertson, who made the final selection after consultation with the candidates's supervisors and Street Superintendent Schulz (App. E, 22a-28a).

Schultz' involvement in the November 18, 1987 promotional process included: Announcing the opening of the Crew Supervisor position (App. E, 23a); Preparing the initial draft of questions for both the written and oral exams (App. E, 26a); Deciding how different parts of the tests should be

weighed and graded (App. E, 26a-27a); Adding two additional questions for the written test at the last minute (App. E, 27a); Serving as an evaluator on the panel for the initial oral exam (App. E, 30a-31a); Grading the written test (App. E, 28a), and making an oral recommendation to Mr. Culbertson (App. E, 33a).

The white selectee, Mr. Mark Bowman, obtained 38.15 points on the oral exam, while Mr. Chavez scored 36.65 points, (App. E, 32a). On the written test, Mr. Chavez scored 10.5 points and Mr. Bowman scored 9 points (App. E, 28a). Mr. Bowman was listed first on the eligibility list that went to Mr. Culbertson because Mr. Bowman had scored better on the more heavily weighted portion of the test, the oral portion, (App. E, 32a).

From a list of applicants, Mr. Culbertson narrowed the list to Mr. Chavez and Mr. Bowman (App. E, 33a). In making his choice, Mr. Culbertson received Mr. Schultz's recommendation and the recommendation of the candidates' direct supervisors (App. E, 33a).

Mr. Chavez' direct supervisor, Mr. Willis Hammons, initially recommended two white males to Mr. Culbertson, (App. E, 34a), but when told he must choose between Mr. Chavez and Mr. Bowman, Mr. Hammons selected Mr. Chavez because Mr. Chavez had more experience on the crew in question and more years of service with the City (App. E, 34a). At trial, Mr. Hammons testified that he thought that selectee Bowman acted "like a childish clown" (App. E, 34a). Mr. Hammons testified that Mr. Chavez had proved himself on the job and was qualified (App. E, 35a). While Mr. Culbertson testified that he also relied upon the recommendation of selectee Bowman's supervisor, the district court judge, Judge Edward Nottingham, found Beasley's testimony to be "not . . . very fully developed "(App. E, 36a).

While Mr. Culbertson did not specify exactly what weight he gave the opinions of the supervisors in reaching his decision, he did infer that he considered the two immediate supervisors' opinions to be a "wash" since each one recommended his own worker, leaving Culbertson with Mr. Schulz' recommendation of Mr. Bowman over Mr. Chavez, which recommendation Mr. Schulz gave in writing (App. E, 36a-37a).

Judge Nottingham found that Mr. Culbertson (personally) was not motivated by a retaliatory animus (App. E, 47a-48a) but found that Mr. Schulz, who played a substantial part in the promotional and decision making process was motivated by a retaliatory animus (App.E, 48a-49a). As one of the factors he used in finding retaliatory animus, Judge Nottingham credited Mr. Chavez's testimony that after the written test, Mr. Schulz told Chavez, "Oh, no, you're not going to pull that one again on me," (App. E, 49a), referring to Chavez' filing of the equal employment opportunity charge in 1977 when Mr. Schulz was supervisor of the department (App. E, 49a). Judge Nottingham also found that Mr. Chavez had established retaliation in the 1987 nonselection based upon Mr. Schulz' retaliatory grading of the oral test, which came after the written test, in the promotional process. Judge Nottingham found Mr. Schulz' explanation at trial as to how he graded Mr. Chavez on the oral exam to be: "lame and late and incredible" (App. E, 50a). Judge Nottingham noted that at the time that Schulz graded Mr. Chavez on his oral exam, Mr. Chavez had already challenged Mr. Schulz about Mr. Schultz' grading of the written test, prompting Mr. Schulz' retort: "Oh, no, you're not going to pull that one again on me " (App. E, 49a-50a). Judge Nottingham carefully explained, using Exhibits that were introduced at trial, how Mr. Schulz' grading of Mr. Chavez during the oral exam was retaliatory and caused Mr. Chavez not to have the higher overall score (App. E, 51a-53a). Judge Nottingham found that Mr. Schulz' recommendation had "some weight," (App. E, 51a) in Culbertson's final decision.

After noting that the *McDonnell Douglas v. Green,* 411 U.S. 792 (1973) analysis does not apply in a "mixed motive" case (App. E, 43a), and stating: ". . . I don't see this as a circumstantial case of discrimination " (App. E, 45a) and after stating: "And so for those reasons, I don't analyze the case as a pretextual case at all, even though there's a lot of evidence from which I suppose the plaintiff would ask me to find pretext," (App. E, 47a) Judge Nottingham found that Mr. Chavez had presented a "mixed motive" case of retaliation under *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989). In his factual findings, Judge Nottingham credited Mr. Chavez' version that the "Oh, no you're not going to pull that one on me again "statement by Mr. Schultz directly referred to Mr. Chavez' 1977 EEO complaint and also found that Mr. Schulz' grading of the oral exam showed retaliation because it was "simply inexplicable," noting that there were two or three questions where Mr. Chavez and selectee Mr. Bowman gave identical answers but Mr. Schultz graded Mr. Bowman a 10 while grading Mr. Chavez a 2 (App. E, 50a). Judge Nottingham found that because the City failed to prove that its decision would have been the same, absent consideration of the improper factors, under *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989) since the City failed to present evidence that it would have made the same decision without Mr. Schulz' substantial input and retaliatory grading of the test, Mr. Chavez would have to prevail.

Judge Nottingham also found a "long standing and continuing" hostile work environment (App. E, 38a-39a) noting that the City's defense (to the hostile work environment) was "strained and I find the City goes to extraordinary lengths to look the other direction when things are done to this man." Judge Nottingham found that there was a good deal of racial hostility in the work place under Mr. Schultz. As part of his evidence at trial, Mr. Chavez introduced an anonymous note

that was left on his windshield, stating "Happiness is being an illegal alien," (App. E, 40a) which note was shrugged off by City supervisors. As part of what he presented as a pattern of retaliation and harassment, Mr. Chavez also introduced at trial, *inter alia*, a stuffed dog that had been hung in the workroom floor with the words "Mr. Chavez" affixed to it (App. E, 40a). Judge Nottingham found that these incidents were directed at Mr. Chavez (App. E, 41a) and found that this type of hostile working environment was "predictable" because City supervisors receive no training on equal employment opportunity (App. E, 40a-41a). Judge Nottingham found that while the final decision maker, Mr. Culbertson, may not have himself been motivated by a retaliatory animus, Mr. Culbertson's undisputed reliance on Mr. Schulz' opinion, and Mr. Schulz' substantial part in the selection process, infected the process (App.E, 53a-54a) mandating a finding in Mr. Chavez' favor.

While Judge Nottingham applied a "mixed motive" analysis to the facts, the United States Court of Appeal for the Tenth Circuit reversed Judge Nottingham's findings of a "causal connection" between the prior equal employment opportunity activity in 1977 and the 1987 failure to promote holding that the ten year lapse between Chavez' protected activity and the adverse action did not permit an inference of retaliation and finding that the "Oh, no . . ." statement by Mr. Schulz was equivocal and "not a sufficient reed upon which to hang a judgment for nearly $50,000" (App. B, 15a-16a).

REASONS FOR GRANTING THE WRIT

This Court should grant the writ in order to resolve a split between the Tenth Circuit and other federal circuit courts of appeals as to whether in a 42 U.S.C. § 2000e-3(a) Title VII retaliation case, the temporal proximity of the adverse action

may defeat a retaliation claim, as the Tenth Circuit has in effect ruled here, or, whether causation may be established by other factors which include direct evidence of a retaliatorty comment made during the promotional process tying the adverse action to the prior protected activity and proof that the Petitioner's scores on an oral test used in the promotional process were subject to retaliatory grading.

Contrary to the Tenth Circuit's opinion, the district court did not include "temporal proximity" as a factor it considered in determining causation nor did the district court "infer a retaliatory motive" based upon temporal proximity. Instead, the district court found that Mr. Schultz' statement to Mr. Chavez: "Oh no, you're not going to pull that one on me again," referred to Mr. Chavez' 1977 EEO complaint and was direct evidence of retaliation. The district court found that this statement, and the circumstances surrounding this statement, in conjunction with Mr. Schultz' retaliatory grading of the oral exam, was sufficient direct evidence under *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989) to shift the burden of proof to the City to prove that it would have made the same decision without Schulz' input and retaliatory grading, a burden that the City failed to discharge.

While it has been generally accepted in other circuits that the timing of an adverse action in relation to the protected activity is "a factor" that can be considered in determining "causation," *Booth v. Birmingham News Co.,* 704 F. Supp. 213 (N.D. Ala. 1988), *aff'd without op.,* 864 F. 2d 793 (11th Cir. 1988) heretofore, temporal proximity has never enjoyed the status of a dispositive factor to defeat causation, creating a temporal shield of liability for employers regardless of other important factors credited by the factfinder. While the district court, after finding "direct evidence" of retaliation, properly applied a "mixed motive" analysis under *Price Waterhouse v.*

Hopkins, 490 U.S. 228 (1989), the Tenth Circuit improperly reversed the district court's finding of direct evidence, disallowed Mr. Chavez his long established right to have the factfinder evaluate *all* of his evidence under a circumstantial evidence analysis, and established temporal proximity as a dispositive factor for determining if a plaintiff has established the requisite "causal link" for a *prima facie* case.

Because the district court's view that the "Oh, no . . ." statement and the retaliatory grading are "direct evidence" of retaliation is a permissible view of the evidence, it is critical that this Court determine when, if ever, temporal proximity can serve to lessen, or eliminate from consideration, as the Tenth Circuit has now done, factors relied upon by the factfinder. Heretofore, when there has been two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous, *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985).

Other circuit courts, while acknowledging that temporal proximity may suffice as "a factor" to determine causation, hold that other factors, such as the sequence of events occurring during the elapsed time, as well as actions taken by both the plaintiff and defendant during the time may also be used in determining whether a causal link has been established, *Collins v. State of Illinois*, 830 F. 2d 692, 704-705 (7th Cir. 1987).

Further, even if the district court's analysis under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), was wrong, which it was not, because the district court point blank stated in its opinion that it had not done a "pretext" analysis, (App. E, 44a--46a), in order to conform with prior opinions of this Court and the opinions of other circuits, even if the Tenth Circuit found insufficient "direct evidence," it cannot deprive Mr. Chavez of his right to have all his evidence evaluated under a "circumstantial evidence" analysis, under *McDonnell Douglas*

"circumstantial evidence" analysis, under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) particularly when Judge Nottingham acknowledged in his opinion that in making his ruling he was not setting forth*all* the evidence that Mr. Chavez presented at trial to prove pretext, *i.e.*, that Petitioner was more qualified, etc. (App. E, 46a).

The Tenth Circuit's denial of a "pretext" analysis to Mr. Chavez has produced an opinion totally at odds with established Title VII theory that the elements for establishing a *prima facia* case not be inflexible but necessarily vary with the circumstances of the case presented and basis of discrimination alleged, *Furnco Construction Corp. v. Walters*, 438 U.S. 567 (1978). The Tenth Circuit's refusal to remand this case to the district court for a "pretext" analysis flies in the face of this Court's long accepted holding that a plaintiff in a Title VII action is not required to provide direct evidence, *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983) as direct evidence is only one of three types of proof that can establish causation or prove pretext. The Tenth Circuit's decision contradicts the view held by this Court and other circuits that insufficient "direct evidence" is not fatal, because if plaintiff's evidence is not found to be direct, it is then subject to a circumstantial evidence analysis, *Holmes v. Bevilacqua*, 794 F. 2d 142, 146 (4th Cir. 1986) (*en banc*).

Further, while the Tenth Circuit's opinion states that the hostile work environment found by the district court judge was ". . . as we understand it, not the cause of the City's decision to promote" the white selectee over Mr. Chavez (App. B, 10a), the Tenth Circuit fails to acknowledge that it was only because of its findings of "direct evidence" of retaliation and application of the *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) pattern of proof (App. E, 42a-43a) that the district court failed to consider the impact that the established hostile work

environment had upon the selection. But for the district court's finding that Mr. Chavez proved up direct evidence of retaliation, the district court's finding of a "long standing and continuing" hostile work environment (App. E, 38a) would have been a factor that the district court would have considered had it done a *McDonnell Douglas v. Green* analysis, (*see Spain v. Gallegos*, 26 F. 3d 439 (3rd Cir. 1994) wherein the Third Circuit Court of Appeals held, in a sexual discrimination case, that an employee may establish a *prima facie* case of sexual discrimination and harassment, absent proof of blatant sexual misconduct, by demonstrating the existence of a hostile work environment.)

Even assuming that the district court erred in finding "direct evidence," there simply is no reason under Title VII that the proven and unappealed finding of a hostile work environment should not also be a factor considered in determining "a causal link" or finding pretext under 42 U.S.C. § 2000e-3(a) in a failure to promote case, particularly, as here, where the district court finds that the hostile work environment was a foreseeable consequence of a lack of equal employment opportunity training (App. E, 40a-41a) and the district court specifically found that: ". . . the City goes to extraordinary lengths to look the other direction when things are done to this man" (App. E, 38a-41a).

In order to provide much needed guidance as to when, if ever, temporal proximity may serve to lessen or defeat other important factors, including direct evidence, properly relied upon by the factfinder in determining causation under 42 U.S.C. § 2000e-3(a), and to provide uniformity for an employee's heretofore undisputed right to have his evidence analyzed under both a direct evidence and an indirect evidence standard of proof, certiorari is appropriate.

I.

WHERE THE EVIDENCE FOR CAUSATION UNDER 42 U.S.C. § 2000e-3(a) CONSISTS OF DIRECT TESTIMONY AND OTHER IMPORTANT FACTORS WHICH THE DISTRICT COURT PROPERLY CREDITS, THE TENTH CIRCUIT CANNOT REVERSE THE DISTRICT COURT BASED UPON TEMPORAL PROXIMITY.

The Tenth Circuit's opinion in this case not only improperly fails to recognize that when there are two "permissible views" of direct evidence, the factfinder's view cannot be "clearly erroneous," *Anderson v. City of Bessemer City,* 470 U.S. 564 (1985), but the decision fails to understand the effect that a district court's finding of direct evidence has upon a defendant's burden under *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989), and the opinion unduly limits the factors that an employee may rely upon in establishing the "causal link" under 42 U.S.C. § 2000e-3(a).

An important fact in this case is that in appealing Judge Nottingham's ruling in Mr. Chavez favor, the City did not provide a transcript of the trial to the Tenth Circuit, even though under Tenth Circuit Rule 10.1. ". . . when sufficiency of the evidence is raised, the entire trial transcript ordinarily should be provided." Therefore, on appeal, the Tenth Circuit's review of the sufficiency of the evidence was limited to Judge Nottingham's factual findings (App. B, 4a).

Under 42 U.S.C. § 2000e-3(a), in order to establish a *prima facie* case of retaliation, an employee must establish: (1) That he engaged or participated in a prior protected Title VII proceeding; (2) That he was later disadvantaged by action of his employer subsequent to or contemporaneously with such

participation; and (3) That there is a causal connection between the protected activity and the adverse employment action, *Burrus v. United Telephone Co. of Kansas, Inc.*, 683 F. 2d 339, 343 (10th Cir. 1982), *cert. denied*, 459 U.S. 1071 (1982).

The district court credited Mr. Chavez' evidence that the context in which, and the circumstances surrounding the "Oh, no you're not going to pull that one on me again" statement, coupled with Mr. Schulz' retaliatory downgrading of Mr. Chavez' test results on the oral exam showed direct evidence of retaliation sufficient to shift the burden of proof to the City under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). While the Tenth Circuit halfheartedly states that a prior complaint, no matter how distant in the past, could be the basis for retaliation IF there were evidence tying the adverse employer action to the past protected activity" (App. B, 15a), the Tenth Circuit then improperly discounts the "direct evidence" credited by the district court, thereby allowing itself to use the undisputed 10 year passage of time between Mr. Chavez' 1977 complaint and the 1987 failure to promote to defeat causation.

The Tenth Circuit's holding that: "To us, it is significant that the adverse action was separated from the protected activity by some ten years," (App. B, 14a) and the Tenth Circuit's reliance upon its opinion in *Burrus*, 683 F. 2d at 1262, that "no inference of retaliatory motive [is] permitted where employee's charges were not "closely followed by adverse action; showing of termination almost three years after employee filed charges did not establish prima facie case of retaliation" (App. B, 15a) fails to recognize that where a plaintiff presents direct evidence of a statement made by a supervisor intricately involved in the promotional process and which statement ties the prior protected activity with the adverse action, it becomes defendant's burden to prove that

defendant would have made the same promotional decision despite the retaliatory factors, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The Tenth Circuit's decision also fails to acknowledge that factors other than temporal proximity may be used to establish or infer a causal link. It violates the purposes of Title VII to establish "temporal proximity" as an element for a prima facie case. While the proximate timing of an adverse action is one factor that may be considered in determining causation, *Booth v. Birmingham News Co.*, 704 F. Supp. 213, *aff'd without op.*, 864 F. 2d 793 (11th Cir. (Ala.) 1988), there is no language or legislative history behind Title VII that supports elevating temporal proximity to the status of a *prima facie* element, nor is there any support for allowing temporal proximity to lessen or eliminate other factors relied upon by the factfinder. To do so violates this Court's mandate in *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978) that elements of proof in discrimination cases are not meant to be "rigid, mechanized, or ritualistic."

The determination of what motivates an employer's conduct is "both sensitive and difficult," and is treated as a pure question of fact subject to Federal Rule of Civil Procedure 52(a)'s clearly erroneous standard, *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983). Had the Tenth Circuit not focused itself on the undisputed 10 year period of time between Mr. Chavez' protected activity and the failure to promote, it would have recognized that under the "clearly erroneous" standard, the district court's finding that Mr. Schulz' direct statement to the Mr. Chavez that "Oh, no you're not going to pull that one on me again," which was made by Mr. Schulz to Mr. Chavez as Mr. Chavez was challenging Mr. Schulz' grading of the 1987 written test, could be permissively viewed as relating back to Mr. Chavez' 1977 EEO complaint against Mr. Schulz (App. E, 49a-51a). This "direct evidence" coupled with the district court's findings on why and how Mr.

Schulz' grading of Mr. Chavez' scores on the oral exam were retaliatory, coupled with the district court's (unappealed) finding of a longstanding hostile work environment inflicted upon Mr. Chavez under Mr. Schulz' supervision (App. E, 38a-41a, 47a) was sufficient to shift the burden of proof to the City under this Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

In *Price Waterhouse v. Hopkins*, 490 U.S. 228, (1989) this Court held that when the plaintiff's proof includes direct evidence that an illegal factor plays a motivating part in an employment decision, the *McDonnell Douglas* test does not apply. Rather, "the employer may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision if it had not taken the employee's gender into account," *see* 490 U.S. at 258.

The district court did not consider the City's failure to promote Mr. Chavez nor Mr. Schulz' "Oh, no . . ." comment in a vacuum but was presented with preponderant proof of racial slurs and retaliatory pranks that Mr. Chavez was subjected to in the workplace before, during, and after his nonselection (*i.e.*, the anonymous note that was left on Mr. Chavez' windshield, stating "Happiness is being an illegal alien," (App. E, 41a) which note was shrugged off by Mr. Chavez' supervisors; the stuffed dog that was hung in the workroom floor with the words "Mr. Chavez" affixed to it(App. E, 41a), which the district court found was directed at Mr. Chavez (App. E, 41a). Further, the district court went to great lengths to explain that the hostile work environment it found was the work environment under Mr. Schulz (App. E, 47a).

As the district court carefully explained in its opinion, Mr. Schulz' role in the extended promotion process was substantial as Mr. Schultz announced the opening of the Crew Supervisor

position (App. E, 24a); prepared the initial draft of questions for both the written and oral exams (App. E, 26a); decided how different parts of the tests should be weighed and graded (App. E, 26a-27a); added two additional questions for the written test at the last minute (App. E, 27a); served as an evaluator on the panel for the initial oral exam (App. E, 31a-32a); graded the written test (App. E, 28a), and, made an oral recommendation to Mr. Culbertson (App. E, 33a). Because the district court found that Mr. Schulz' recommendation of the white selectee over Mr. Chavez had "some weight" (App. E, 51a) in Culbertson's final decision, and Mr. Culbertson testified that he accepted Mr. Schulz' grading of the tests, and received Schulz' recommendation, the fact that Mr. Schulz was not the final decision-maker does not spare the City from liability for the infected promotional process, *Shager v. Upjohn Company*, 913 F. 2d 398 (7th Cir. 1990); *Field v. Clark University*, 817 F. 2d 931 (1st Cir. 1987).

As the district court found (App. E, 53a-54a) there was no showing by the City that Mr. Culbertson's decision would have been the same had he thrown out the recommendation of Mr. Schulz, or had he thrown out the results of the oral test (which the trial court found were intentionally manipulated by Mr. Schulz against Mr. Chavez for retaliatory reasons (App. E, 53a-54a). As this Court stated in *Price Waterhouse*, 490 U.S. at 252:

> [I]n most cases, the employer should be able to present some objective evidence as to its probable decision in the absence of an impermissible motive.

This Court has never construed the "causal link" requirement for a *prima facie* case of retaliation to be defeated by the passage of time between the protected activity and the adverse action. In *Simmons v. Camden County Board of*

Education, 757 F. 2d 1187, 1189 (11th Cir.), *cert. denied*, 474 U.S. 981 (1985), the Eleventh Circuit construed the "causal link" element to require merely that the plaintiff establish that the protected activity and the adverse action not be wholly unrelated. While the temporal proximity of a protected activity and an adverse employment action may suffice as a factor in establishing the required causal link, temporal proximity, in and by itself, is not dispositive of a retaliation claim under 42 U.S.C. § 2000e-3(a). Where the evidence for the *prima facie* case consists, as it did here, of direct testimony that a defendant acted with retaliatory motivation, if the trier of fact believes the direct evidence, regardless of temporal proximity, the ultimate issue of retaliation is proven.

II.

WHERE THE TENTH CIRCUIT FINDS INSUFFICIENT DIRECT EVIDENCE OF RETALIATION TO UPHOLD A DECISION IN FAVOR OF AN EMPLOYEE, THE TENTH CIRCUIT CANNOT DENY THE EMPLOYEE THE RIGHT TO HAVE HIS DIRECT EVIDENCE RE-EVALUATED BY THE DISTRICT COURT, ALONG WITH ALL OTHER EVIDENCE TO DETERMINE IF THERE IS PREPONDERANT EVIDENCE OF PRETEXT UNDER *McDONNELL DOUGLAS V. GREEN*, 411 U.S. 792 (1973).

Even if the Tenth Circuit's reversal of the district court's finding of "direct evidence" were proper, the Tenth Circuit erred in refusing to remand this case to the district court for a re-evaluation of all Mr. Chavez' evidence under *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). A "mixed motive" analysis is only one means of proving a case of discrimination or retaliation. Heretofore, this Court has recognized three major modes of proof and analysis in disparate treatment cases:

pattern and practice, direct evidence, and circumstantial evidence.

There is no way to get around the fact that in several places in his decision, Judge Nottingham made it clear that it was because he found "direct evidence" of discrimination and it was because he applied a *Price Waterhouse* "mixed motive" analysis, that Judge Nottingham did not do a "circumstantial evidence" analysis of Mr. Chavez' evidence under *McDonnell Douglas v. Green.* For example, the district court stated: "And so for those reasons, I don't analyze the case as a pretextual case at all, even though there's a lot of evidence from which I suppose the plaintiff would ask me to find pretext," (App. E, 47a). More importantly, within his decision, Judge Nottingham stated (App. E, 46a):

> Now, how does *Price Waterhouse* apply here? As I've said, I don't see this as a circumstantial case of discrimination, and I'm somewhat hesitant in saying that because the plaintiff has somewhat pursued it as such a case by suggesting that really the factors that Mr. Culbertson relied on were pretextual and in fact Mr Chavez was objectively much more qualified than Mr. Bowman and, therefore, the decision must have been pretextual because any objective observer looking at these facts would arrive at the conclusion that Mr. Chavez was more, qualified.

Even the Tenth Circuit has stated in *Notari v. Denver Water Department,* 971 F. 2d 589 (10th Cir. 1992) "Under general rules, his [the employee's] lack of direct evidence is not fatal because he may proceed to state his *prima facie* case

without difficulty using the four-prong *McDonnell Douglas* formulation. The *McDonnell Douglas* presumption operates to provide this plaintiff with an opportunity to rely upon his strong indirect evidence to convince a fact finder that his employer discriminated against him."

Because the district court noted that there was a great deal of evidence which Petitioner presented but which the district court left out of its opinion (*i.e.*, Petitioner being more objectively qualified than the selectee; Petitioner's background and experience better fitting the job description; Petitioner's superior fit for a City supervisor's job when compared with the selectee who has sexually harassed women for years; Petitioner's prior superior performance evaluations) even if the Tenth Circuit found insufficient "direct evidence," it cannot deprive Mr. Chavez of his right to have all his evidence evaluated under a "circumstantial evidence" analysis under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Contrary to the Tenth Circuit's "direct evidence or nothing" result, a plaintiff is not required to provide direct evidence at trial, *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983). Insufficient "direct evidence" is not fatal, because if plaintiff's evidence is not found to be direct, it is then put through a circumstantial evidence evaluation, *Holmes v. Bevilacqua*, 794 F. 2d 142, 146 (4th Cir. 1986) (*en banc*).

Further, while the Tenth Circuit's opinion states that the hostile work environment found by Judge Nottingham was ". . . as we understand it, not the cause of the City's decision to promote" the white selectee over Mr. Chavez, (App. B, 10a), the Tenth Circuit fails to acknowledge Judge Nottingham's explanation that it was only because of his findings of "direct evidence" of retaliation and application of the *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) pattern of proof

(App. E, 42a) that the district court failed to consider the impact that the hostile work environment (unappealed by the City) had upon the selection.

In sum, even if the Tenth Circuit's reversal of the district court's findings of direct evidence were proper, the Tenth Circuit cannot deprive Mr. Chavez of his right to have the factfinder determine if the finding of a "long standing and continuing" hostile work environment (App. E, 38a-41a) and the finding that: ". . . the City goes to extraordinary lengths to look the other direction when things are done to this man" (App. E, 41a), and the finding that actions taken against Mr. Chavez are: "part of an ongoing pattern of conduct that nobody ever really attempts to do anything about it," (App. 40a), under a *McDonnell Douglas v. Green* analysis not only provide a "causal link" for Mr. Chavez' *prima facie* case but establishes retaliation (*see Spain v. Gallegos*, 26 F. 3d 439 (3rd Cir. 1994) wherein the Third Circuit Court of Appeals held, in a sexual discrimination case, that an employee may establish a *prima facie* case of sexual discrimination and harassment, absent proof of blatant sexual misconduct, by demonstrating the existence of a hostile work environment; *see Mohammed v. Callaway*, 698 F. 2d 395 (10th Cir. 1983) finding that relevant evidence in a failure to promote case includes the employer's prior treatment of the plaintiff.)

Moreover, while Judge Nottingham should have been provided the opportunity to apply a *McDonnell Douglas v. Green* analysis, because the Tenth Circuit erred in its ruling on causation and because Judge Nottingham's findings regarding the hostile work environment that Mr. Chavez was subjected to, before, at the time of, and after the selection were not challenged on appeal (no transcript was ordered by the City with its appeal) (App. B, 4a) and because the district court's extensive findings regarding Schulz' retaliatory animus and

retaliatory grading sufficiently show that Mr. Chavez met his "ultimate burden of persuasion," after granting the petition for writ of certiorari, the district court's decision in favor of Mr. Chavez should be affirmed, *see St. Mary's Honor Center, et al. v. Hicks*, 113 S. Ct. 2742 (1993).

CONCLUSION

For the reasons stated, this Petition for Certiorari should be granted.

Respectfully submitted,

EVA CAMACHO WOODARD
Counsel of Record
THE LAW OFFICE OF
EVA CAMACHO WOODARD
Attorney for Petitioner
200 Union Boulevard, Suite 306
Union Plaza
Lakewood, Colorado 80228-1831
(303) 763-5770

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED SEPTEMBER 4, 1996

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 95-1042

GARY CHAVEZ,

Plaintiff-Appellee,

v.

ARVADA, CITY OF, a municipal corporation,

Defendant-Appellant.

ORDER
Entered September 4, 1996

Before ANDERSON and McWILLIAMS, Circuit Judges, and HOLMES*, District Judge.

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate

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* The Honorable Sven Erik Holmes, District Judge for the Northern District of Oklahoma, sitting by designation.

Appendix A

Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court
PATRICK FISHER, Clerk

s/ Audrey F. Wergel
Audrey F. Wergel
Deputy Clerk

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED JULY 5, 1996

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 95-1042

GARY CHAVEZ,

Plaintiff-Appellee,

v.

CITY OF ARVADA, a municipal corporation,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. No. 90-N-99)

Robert M. Liechty (Theodore S. Halaby with him on the brief) of Halaby Cross Liechty Schluter & Buck, Denver, Colorado, for Defendant-Appellant.

Eva Camacho Woodard, Lakewood, Colorado, for Plaintiff-Appellee.

Before ANDERSON, Circuit Judge, McWILLIAMS, Senior Circuit Judge, andHOLMES, District Judge.*

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* Honorable Sven Erik Holmes, District Judge for the Northern District of Oklahoma, sitting by designation.

Appendix B

McWILLIAMS, Senior Circuit Judge.

Gary Chavez, a long-time employee of the City of Arvada ("City") brought an employment discrimination action (failure to promote) under 42 U.S.C. § 2000e,*et seq.*, against the City in the United States District Court for the District of Colorado. In a trial to the court, the district court found that the City had failed to promote Chavez in retaliation for his filing a complaint against the City with the Equal Employment Opportunity Commission ("EEOC") some ten years prior thereto. The district court then entered judgment in favor of Chavez and against the City in the sum of $23,065, said sum representing back pay and interest thereon. The district court also entered an additional judgment in favor of Chavez and against the City for attorney's fees and costs in the amount of $25,262, making the total amount of the judgment $48,327. The City appeals.

At the conclusion of the presentation of evidence, and after oral argument of counsel, the district court on December 12, 1991, made its findings of facts and conclusions of law from the bench. Such findings and conclusions were in considerable detail and cover some 46 typewritten pages, double-spaced, in the City's appendix.[1] The trial transcript is not a part of the record before us, and counsel for both sides in their respective briefs rely on the district court's findings for their Statement of Facts. Such being the case, we must necessarily also rely on the findings of the district court in detailing the sequence of events giving rise to the present controversy.

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1. The City filed a notice of appeal from the judgment entered on or about December 12, 1991. That appeal, No. 94-1520, was later dismissed because of a jurisdictional defect. An amended judgment was entered by the district court on December 22, 1994, and an amended notice of appeal was filed on January 23, 1995.

Appendix B

Relying then on the district court's recital of the background facts, it appears that the City has a Public Works Department and that one Ron Culbertson at all pertinent times was the Director of the department. Within the Public Works Department, there are several subdivisions, one of which is the Street and Drainage Maintenance Division. One Kelly Schulz headed this division from 1971 until January 16, 1988. There are three crews within the Street and Drainage Maintenance Division, namely: (1) the sweeping and mowing crew; (2) the asphalt crew; and (3) the drainage and concrete crew. Each of these crews has a "crew supervisor." The position which Chavez sought, but did not get, was the position of crew supervisor for the drainage and concrete crew. The position became vacant when the incumbent retired. At the time of the vacancy in the position of crew supervisor for the drainage and concrete crew, Chavez, who had previously been on that particular crew, was a member of the sweeping and mowing crew which was then headed by a Mr. Hammons.

The vacancy in the position of crew supervisor for the drainage and concrete crew occurred in the Fall of 1987, and the City proceeded to fill the vacancy. Notice was posted and ten persons applied for the vacancy in question. After a testing process, all ten were certified as possessing the required minimum qualifications to the selecting authority, Culbertson.

The testing process was rather elaborate and consisted, *inter alia*, of both a written and oral examination, with the oral examination constituting 75% of the final test score, and the written examination constituting 25% of the final score. The district court concluded that the written test had been "fairly and correctly administered, graded and scored." More will be said later about the oral examination. A Mr. Bowman, who

ultimately was made crew supervisor for the drainage and concrete crew, scored slightly higher than Chavez in the oral examination, whereas Chavez scored slightly higher than Bowman on the written examination. Combining both examinations, Bowman and Chavez had identical scores of 47.15 on the combined oral and written examinations. Bowman was apparently listed first on the eligibility list since he scored higher than Chavez on the more heavily weighted portion of the test, namely, the oral examination.

Although Culbertson was technically permitted to choose any of the ten persons on the eligibility list, he quickly narrowed the list to Chavez and Bowman. As a part of the selection process, Culbertson sought the recommendation of Schulz, who would be the direct supervisor of the successful candidate, as well as the recommendation of the then current direct supervisor of both Chavez and Bowman. As indicated, Chavez was then serving as senior equipment operator on the sweeping and mowing crew, which was headed by Hammons, and Bowman was a senior equipment operator on the asphalt crew, which was then headed by Dick Beasley. Hammons recommended Chavez. Beasley recommended Bowman. Schulz recommended Bowman.

In addition to considering the recommendations of Hammons, Beasley and Schulz, and the test scores, Culbertson developed five questions to be put to the two candidates in his oral interview with each. After interviewing both Bowman and Chavez, and considering, *inter alia*, their answers to his five questions, to which Bowman scored higher than Chavez, Culbertson selected Bowman to be the crew supervisor for the drainage and concrete crew. The district court in its findings stated that Culbertson in selecting Bowman over Chavez

"relied upon his own judgment as to who provided better answers to his questions."

The district court also found that in 1977 Chavez filed a claim of discrimination with the EEOC claiming that the City failed to train him for a position of senior equipment operator. The court further noted that the claim had been settled and that Chavez "dropped the matter without proceeding further." Continuing, the district court found, however, that there was no persuasive evidence that Culbertson knew of Chavez' prior claim when he made the decision to promote Bowman over Chavez in 1987. The district court also noted, parenthetically, that in 1990, about two years after Chavez did not get the promotion to crew supervisor of the drainage and concrete crew, Chavez had been promoted to crew supervisor of the sweeping and mowing crew when Hammons retired. The district court observed that in getting that promotion the "testing process" was similar to the testing process used two years earlier when Chavez did not get the promotion. At that time, Chavez obtained the highest score on both the written and oral examinations and it was Culbertson who appointed him.

As indicated, Culbertson, being the Director of Public Works Division, was the sole appointing authority for the position of crew supervisor for the drainage and concrete crew. Culbertson testified at trial. The district court summarized Culbertson's testimony concerning his personal decision to select Bowman, not Chavez, for the position in question as follows:

> He testified that he relied upon his own judgment as to who provided better answers to his questions. He relied upon the test

> results as to which the candidates were scored but — the candidates were tied, but Mr. Bowman had an edge because of his higher score on the oral test. Mr. Culbertson also relied upon the supervisors' recommendations. He clearly stated that he examined all the information as a whole and that it was all considered equally — and that he considered it equally important to him in making his decision.

The district court also found that there was a "hostile work environment" within the Street and Drainage Maintenance Division based on "sex and national origin." However, the district court rejected Chavez' suggestion that the hostile work environment was "strong evidence" of discrimination when he was passed over for promotion to the position of crew supervisor for the drainage and concrete crew. In this regard, the district court concluded that *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) governs cases where "a plaintiff attempts to prove a case of discrimination by circumstantial evidence" and does not apply "very readily when you've got direct evidence of discrimination." Having thus concluded, the district court expressed the view that the present case is a "mixed motive" case, and, as such, governed by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). According to the district court, the "burden of proof under *Price Waterhouse* shifts to the defendant to demonstrate by a preponderance of the evidence that the same employment decision would have been made even if the improper or illegal factors had not been considered."

As concerns Schulz, who was head of the Street and

Drainage Maintenance Division, the district court indicated that although Schulz in recommending Bowman to Culbertson "may not have been motivated by racial animus . . . [he] was motivated by a retaliatory animus, in that he was retaliating against Mr. Chavez for the filing of the previous EEOC complaint." In support thereof the district court noted that when Chavez "approached him [Schulz] after the [written] test, Mr. Schulz told him, 'Oh, no, you're not going to pull that one on me again.' " The district court stated that although Schulz denied making any such statement, it believed Chavez on this particular matter. In this same connection, the district court went on to state that this statement attributed to Schulz by Chavez "was referring to the fact that he was the supervisor in 1977 in the department when Mr. Chavez filed his previous complaint."[2] The district court then held that this was not a "circumstantial evidence" case because there was direct evidence of retaliatory animus on the part of Schulz, based on the "Oh, no . . ." statement, and that Schulz' participation in the grading of the oral examination, as well as his recommendation of Bowman over Chavez, was taken into consideration by Culbertson in making his decision to promote Bowman. Specifically, the district court found that "Mr. Schulz' animus, retaliatory in nature, infected not only his recommendation to Mr. Culbertson, but infected the very test which supposedly provided objectivity to this process." In this particular connection, the district court concluded as follows:

> What we end up with then, or what I end up confronting is this situation. Mr. Culbertson himself may not have intended

---

2. The district court in its findings did recognize the possibility of a personality conflict between Chavez and Schulz, observing that Chavez was aggressive and that Schulz was older and "set in his ways."

> to discriminate, may not have been motivated by a retaliatory animus, but he considered several factors, some of which were discriminatory and improper, others of which were perfectly proper. I, frankly, find nothing improper about his own scoring of his own oral test. He made a case that I find is persuasive that Mr. Bowman scored better on that test, and I'm not going to interfere with his judgment as to that test alone. But he also gave some weight and some unspecified weight to these other improper factors.

Such being the case, the district court opined that under *Price Waterhouse, supra,* the City had the burden of showing that the decision by Culbertson to promote Bowman over Chavez "would have been the same had you thrown out the recommendation of Mr. Schulz, had you thrown out the results of the oral test, and had you thrown out the recommendation of Mr. Beasley," and stated, "I do not believe that that burden has been discharged." So much for the district court's findings of fact.

As his first claim for relief, Chavez alleged in his complaint that the City decided not to promote him to crew supervisor — and instead promoted Mr. Bowman, a white male — because of the fact that he (Chavez) was a Hispanic. As we read the district court's findings, the district court did not so find. The district court did find, *inter alia,* that there was a hostile work environment in the Street and Drainage Maintenance Division based on gender and national origin, but concluded, as we understand it, that such was not the cause of the City's decision to promote Bowman over Chavez.

Appendix B

Chavez also alleged in his complaint that the City's decision to promote Bowman, and not Chavez, to crew supervisor was in retaliation for his filing an EEOC complaint against the City in 1977. Culbertson was originally a defendant in this proceeding. Pursuant to a stipulated motion of the parties, Culbertson was dismissed with prejudice from the case. And in its findings, the district court found that Culbertson, in promoting Bowman instead of Chavez, was not acting in retaliation for Chavez filing a complaint against the City with the EEOC in 1977.

The court's basis, then, for holding the City liable to Chavez, as we understand it, was that Schulz, the head of the Street and Maintenance Division, in evaluating Chavez' answers to the questions posed in the oral examination test, and in his ensuing recommendation of Bowman over Chavez to Culbertson, was acting in retaliation for Chavez filing a complaint against the City with the EEOC some ten years earlier. In this general regard we note that Chavez in his complaint had alleged as follows:

> On or about 11/19/89, the Defendant Appointing Authority Culbertson selected the white male, Mr. Bowman, for the Crew Supervisor position, and as part of his decision, relied heavily upon the advice of Plaintiff s supervisor who stated that he recommended *against* Plaintiff receiving the promotion directly *because* the Plaintiff had previously prevailed in a discrimination complaint he had filed against Defendant City of Arvada and which was resolved in 1977 (emphasis in original).

Appendix B

Significantly, the district court did *not* find that Schulz recommended to Culbertson that Chavez not be appointed supervisor for the drainage and concrete crew *because* Chavez filed a discrimination complaint against the City in 1977. And, importantly, there was *no* evidence which would support Chavez's allegations in his complaint.

The district court did find that in 1977 Schulz was the supervisor of a crew in which Chavez was a member and that Culbertson was then the Director of the Public Works Division. And it was an admitted fact that Chavez in 1977 had filed a complaint against the City with the EEOC, complaining that he had not been afforded training that conceivably could have lead to a promotion. We do not know much more about the details of the complaint, although the complaint was settled without recourse to litigation. What part, if any, Schulz, or Culbertson for that matter, played in the 1977 incident is not in the record before us.

The oral test would appear to be at the core of the present controversy, and perhaps a bit more should be said about it. Schulz, with the assistance of a Mr. Polk, who was in charge of the oral and written examinations, drew up the questions for both examinations. The written examination was held on November 9, 1987, and was graded immediately thereafter by Schulz. As indicated, Chavez outscored Bowman on the written examination, 10.5 to 9. Notwithstanding, before the oral examination was even held, Chavez complained to Schulz about his grading of the written examination. To which, according to Chavez — but denied by Schulz — Schulz said: "Oh, no, you're not going to pull that one again on me." Since Schulz denied making the one sentence attributed to him by Chavez, he of course would not have to explain the statement.

Appendix B

As far as we can tell, Chavez did not opine as to his understanding of the statement. However, the district court held that this one sentence uttered by Schulz showed retaliatory animus for Chavez filing a complaint with the EEOC in 1977. And the district court held that this retaliatory animus caused Schultz who was but one of five evaluators of the oral examination, to give Chavez low marks on the oral examination and to recommend Bowman over Chavez to Culbertson.

We review the district court's factual findings under the clearly erroneous standard. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). *See also Candelaria v. EG & G Energy Measurements, Inc.*, 33 F.3d 1259, 1261 (10th Cir. 1994) and *Las Vegas Ice and Cold Storage Co. v. Far West Bank*, 893 F.2d 1182, 1185 (10th Cir. 1990).

In *Burrus v. United Telephone Co. of Kansas, Inc.*, 683 F.2d 339, 343 (10th Cir. 1982), *cert. denied*, 459 U.S. 1071 (1982), we stated that a plaintiff in a retaliation case must first establish, *prima facie*, the following: (1) he engaged or participated in a prior protected Title VII proceeding; (2) he was later disadvantaged by action of his employer subsequent to or contemporaneously with such participation; and (3) there is a causal connection between the protected activity and the adverse employment action. In *Burrus* we went on to say that "[t]he causal connection may be demonstrated by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct *closely followed by adverse action*" (emphasis added). *Id.*

Appendix B

Here any adverse action certainly did not "closely follow" Chavez' protected activity. It occurred some ten years *after* the protected activity. There is nothing in the record before us to indicate that there was any continuing friction, let alone retaliatory animus, between the City and Chavez during that ten-year period. And in any event, the district court held that this was not a "circumstantial evidence case," and that retaliatory animus had been proven by direct evidence.

Back to *Burrus*, we agree that the first and third prongs of the test for adverse employer action based on retaliation were met, i.e. Chavez did engage in protected activity in 1977, and in 1987 he suffered adverse employer action when he was not promoted to crew supervisor for the drainage and concrete crew. The issue to be resolved is whether there was a "causal connection" between Chavez' protected activity in 1977 and the City's failure to promote Chavez in 1987. We hold that the evidence is insufficient to support the district court's finding of "causal connection."

To us, it is significant that the adverse action was separated from the protected activity by some ten years. As stated above, there is nothing in the record before us to indicate that there was continuing friction between the City and Chavez from 1977, the year of the protected activity, and 1987, the year of the adverse employment action. In *Burrus*, the employee had been terminated over three years after her initial charge of gender retaliation. In that case, we upheld the district court's determination that the employer's termination was "justifiable," since male and female employees were all being terminated because there was "duplicating work done elsewhere." In so holding, we said, "[g]iven the length of time [three years] between the filing of [the initial] charges and the

termination, we agree with the trial court that Burrus [the employee] failed to establish a *prima facie* case of retaliation based on her termination." *Id. Candelaria* involved an employee who brought suit alleging that her employer had breached a conciliation agreement which she and her employer had entered into concerning a prior discrimination complaint wherein the employer agreed, *inter alia*, that "there shall be no discrimination or retaliation of any kind against [Candelaria] for raising this complaint." *Candelaria*, 33 F.3d at 1260. In reversing the district court's holding that the employer had acted in retaliation for the employee's earlier complaint, we said that a retaliatory inference could not be drawn where the adverse action was more than three years from the period of protected activity, citing *Burrus*, 683 F.2d at 1262, for the proposition that "no inference of retaliatory motive [is] permitted where employee's charges were not 'closely followed by adverse action'; showing of termination 'almost three years after' employee filed charges did not establish *prima facie* case of retaliation."

So, under the so-called three year rule of *Burrus* and *Candelaria*, the ten-year lapse between Chavez' protected activity in 1977 and the adverse employment action in 1987 would not permit an inference of retaliation. However, it is agreed that a prior complaint no matter how distant in the past, could be the basis for retaliation IF there were evidence tying the adverse employer action to the past protected activity.

Which brings us to the "Oh, no . . ." statement attributed by Chavez to Schulz, but denied by the latter. As indicated, we must accept the district court's finding that Schulz did in fact make the remark. Is such a sufficient reed upon which to hang a judgment for nearly $50,000? We think not.

The statement itself is in our view equivocal; whether it refers to the 1977 episode or something occurring in the intervening ten years is pure guesswork. But for that one bit of evidence, the City, under the described circumstances, would have to prevail. And that short utterance attributed to Schulz by Chavez is not enough to change the result. We are convinced that a mistake was made. *United States Gypsum Co., supra.* In sum, the evidence in our view is insufficient to support the district court's finding that the City did not promote Chavez in 1987 because he filed a complaint with the EEOC in 1977.

Judgment reversed and cause remanded with direction that the district court enter judgment in favor of the City.

APPENDIX C — AMENDED JUDGEMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO FILED DECEMBER 27, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-N-99

GARY CHAVEZ,

Plaintiff,

v.

CITY OF ARVADA, a municipal corporation,

Defendant.

AMENDED JUDGMENT

Pursuant to and in accordance with the order entered by the Honorable Edward W. Nottingham on December 27, 1994, it is

ORDERED that judgment be entered in favor of Plaintiff and against Defendant in the amount of $48,291.00 *nunc pro tunc* October 17, 1994, calculated as follows:

1. Back pay in the amount of $23,065.00 for the period commencing November 18, 1987, and ending October 17, 1994, which amount includes a calculation of interest for this period.

2. Attorney's fees and costs in the amount of $25,262.00, up to September 27, 1994.

Appendix C

Dated at Denver, Colorado, this 27th day of December, 1994 *nunc pro tunc* October 17, 1994.

For the Court:
James R. Manspeaker, Clerk

s/ Stephen P. Ehrlich
Stephen P. Ehrlich
Chief Deputy

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO FILED DECEMBER 20, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-N-99

GARY CHAVEZ,

Plaintiff,

v.

CITY OF ARVADA, a municipal corporation,

Defendant.

ORDER

The matter comes before this Court on the parties' stipulation regarding the entry of a dollar amount pursuant to the direction of the Court's order dated September 27, 1994. Pursuant to the stipulation, the Court orders that judgment be entered in the amount of $48,291.00 *nunc pro tunc* October 17, 1994, calculated as follows: (1) $23,065.00 for Plaintiff's back pay for the period commencing November 18, 1987, through October 17, 1994, which includes an amount for interest through October 17, 1994, and (2) by earlier stipulation of the parties, that Plaintiff shall have $25,226.00 in attorney's fees and costs which was the amount previously ordered on September 27, 1994.

Dated December 20, 1994, *nunc pro tunc* October 17, 1994.

Appendix D

BY THE COURT:
s/ Edward W. Nottingham
Edward W. Nottingham

APPENDIX E — RULING FROM THE BENCH AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO FILED JANUARY 10, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

90 N 99

GARY CHAVEZ,

Plaintiff,

vs.

CITY OF ARVADA,

Defendant.

JUDGE'S RULING FROM THE BENCH
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE EDWARD W. NOTTINGHAM, U. S. District Judge for the District of Colorado, beginning at 4:50 p.m. on the 12th day of December, 1991, in Courtroom C-203, United States Courthouse, Denver, Colorado.

APPEARANCES

For the Plaintiff: Eva Camacho Woodard, Esq.
Eva Woodard Law Office
6595 W. 14th Avenue, #204
Lakewood, Colorado 80214

Appendix E

For the Defendant: John Scherling, Esq.
Theodore Halaby, Esq.
Halaby, McCrea & Cross
1873 S. Bellaire Street, #1400
Denver, Colorado 80222

PROCEEDINGS

(At 4:50 p.m. on December 12, 1991, in the United States District Court at Denver, Colorado, before the HONORABLE EDWARD W. NOTTINGHAM, U. S. District Judge, with Ms. Eva Camacho Woodard appearing as counsel for the plaintiff and Mr. John Scherling and Mr. Theodore Halaby appearing as counsel for the defendant, the following proceedings were had:)

THE COURT: This is Chavez versus City of Arvada, Case 90 N 99. The Court has heard the trial of the case, the witnesses and the arguments and statements of counsel, and what I'm about to do will constitute the findings of fact and conclusions of law required by Rule 52 of the Federal Rules of Civil Procedure.

First, I find that this Court has subject matter jurisdiction over the case, this being a case in which the plaintiff, Gary Chavez, a person of Hispanic national origin, asserts that the defendant, the City of Arvada, discriminated against him in the terms and conditions of his employment. The Court also has jurisdiction over the parties and I will now proceed to the facts which are most centrally in dispute.

The primary issue in this case is whether the City of Arvada violated Title 7 of the 1964 Civil Rights Act by discrimination

in filling a certain crew supervisor position in the Public Works Department on November 18th, 1987. The Public Works Department is an organizational unit of the city government headed by the Director of Public Works. Ron Culbertson has been Director of Public Works since October of 1980 and he has remained Director of Public Works at all times through the present.

There are several divisions in the Department of Public Works. One is the Street and Drainage Maintenance Division. Kelly Schulz headed this division from 1971 to January 16th, 1988. He was replaced by Jim Luft, who has remained superintendent since that date. Mr. Schulz was therefore head of the division when Mr. Chavez, the plaintiff, filed his previous claim with the Equal Opportunity Employment Commission, which claim I will discuss in more detail later in these findings.

Looking beyond the division, the Street and Drainage Maintenance Division, there are three crews in the Street and Drainage Maintenance Division, the sweeping and mowing crew, the asphalt crew and the drainage and concrete crew. Each one of these is headed by a crew supervisor. The position at issue is the position of crew supervisor for the concrete and drainage crew.

This position became available when the incumbent, Mr. Laurent, retired. His retirement was anticipated by Mr. Schulz in the spring of 1987. Consequently, Mr. Schulz called a meeting of all employees in his division. There is no evidence that Mr. Chavez was excluded intentionally or accidentally. I infer from the evidence that he was invited. I further find that he was not present at the meeting.

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At the meeting, Mr. Schulz announced that Mr. Laurent, the crew supervisor for the drainage and concrete crew, would be retiring later in the year and invited those assembled to apply for the vacancy. He also announced that anyone who wished to do so could rotate to the concrete and drainage crew for four weeks to acquire some experience on that crew before the City filled the vacancy.

Although Mr. Chavez was not at the meeting, he thereafter learned that the City was offering employees of the Street and Drainage Maintenance Division the opportunity to rotate for a period of four weeks to the concrete and drainage crew for training and experience there. His crew supervisor, Willis Hammons, told him this.

Hammons claims that Mr. Chavez chose not to go because he had worked on that crew for several years before, transferring to Hammons' sweeping and mowing crew, also because he did not feel that he could benefit from four weeks of additional experience and he was busy with the duties of his own job.

Mr. Chavez acknowledges this choice but claims that the choice was made because Hammons did not initially tell him the purpose of the training, which was to prepare employees who might wish to compete for the anticipated vacancy in the crew supervisor position. He maintains that when he learned of this purpose, he requested rotation and training at least twice and was refused by Mr. Schulz and/or Mr. Hammons.

I find on this issue that the truth lies closer to Mr. Hammons' version of events and that plaintiff has not directly or circumstantially proven this to be an episode of discrimination, that is, this failure to train or omission to train.

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Contrary to plaintiff's contention that this was a deliberate and discriminatory act on the part of Mr. Schulz and/or Mr. Hammons, I do not find credible persuasive evidence that Schulz was ever aware of Mr. Chavez's request for rotation.

As for Hammons, I do not infer deliberate discrimination in this instance because, first, it was Hammons who initially told Mr. Chavez of the rotation opportunity and, second, because it was Hammons who at that time, or later, told Mr. Chavez that the purpose of the rotation was to provide some training for those who might wish to compete for the position of crew supervisor. Why would Mr. Hammons do this if he wished to deny Mr. Chavez the chance to rotate? It does not appear to me that Mr. Hammons withheld information. Also it does not appear to me that Mr. Hammons was motivated by a retaliatory or discriminatory animus generally for reasons that I will discuss momentarily.

It seems most likely to me that Mr. Chavez was afforded full disclosure concerning the availability and purpose of the rotation and that he really did not care to rotate because he was busy on his own crew and already had experience on the concrete and drainage crew.

His current recollection to the contrary is formed after realizing first that all nine remaining applicants for the position, including the women, took advantage of the rotation and, second, that he might have performed better on the test that was eventually given had he rotated and updated his knowledge of the drainage and concrete crew.

The expected vacancy materialized in the fall of 1987 and the City proceeded to fill the vacancy. A notice was posted.

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Although the notice stated that college training was — or it did not state that college training was required, neither did it say that it was irrelevant. I find from the job description and testimony that college training would be a legitimate relevant non-discriminatory consideration in choosing the person to fill this low-level management position.

Ten people applied for the vacancy in question. At the conclusion of the testing process, all ten were certified to the selecting authority, Mr. Culbertson, the Director of Public Works, as possessing the required minimum qualifications.

The testing process itself was the subject of much testimony, and I'll make some findings concerning that process. Mr. Polk was the personnel analyst assigned by the City's personnel department to oversee the process. He was initially inclined toward an exclusively oral test because the sorts of supervisory and managerial skills required for this position could best be evaluated by an oral test. Mr. Schulz felt that at least part of the test should be written so that the reading, writing, spelling and language skills of the applicants can be considered.

Mr. Polk recognized that a written test would probe the applicants' technical knowledge better than an oral test and, consequently, they jointly decided that the test would be partly written and partly oral.

Mr. Schulz prepared the initial draft of questions for both the written and oral exams. He met with Mr. Polk to review them. Mr. Polk made some changes and the two of them, with Mr. Schulz's input being the primary input, prepared a set of correct answers.

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I infer from Mr. Polk's testimony that he consistently felt the oral part of the test should be weighed more heavily than the written. Indeed, it was only at Schulz's suggestion that a part of the test was written. It was never contemplated by Mr. Polk or Mr. Schulz that the oral and written parts would be equally weighed or that the written test would be weighed more heavily than the oral test. They decided, rather, that the oral test would be worth approximately 75 per cent of the final score and the written test would be worth about 25 per cent of the final score.

During the first week in November before administration of the written test on November 9, 1987, it was decided that the oral test would consist of 25 questions, including two subparts to one question, and that those 25 questions would be worth two points each, for a total of 50 points. There were 15 written questions worth one point each, for a total of 15 points. Thus, of a possible 65 points, about 77 per cent came from the oral test and 23 per cent from the written test.

Just before the written test was administered on November 9th, Mr. Schulz told Mr. Polk that he had two additional questions for inclusion on the written test. The first question concerned the placement of batter boards used in placement of sewer lines, the second concerned the applicants' knowledge of the City's so-called fifty-fifty program by which the City shares with landowners the cost of replacing sidewalks.

Mr. Schulz's proposed questions were added literally at the last minute before the written test was administered on November 9th, 1987. The two additional questions were allocated an additional point each, meaning that the oral test was now worth 75 per cent and the written test was worth 25 per cent, and that, it seems to me, is the probable meaning of the

language in the memorandum that was sent to the Colorado Civil Rights Division by the City Attorney at the time.

Contrary to Mr. Chavez's contention that the allocation of weights between the oral and written tests was done after the test was administered and City employees knew that he was a top scorer on the written test, I find, as I have already implied, that the relative weights were assigned before the tests were administered or scored.

Mr. Schulz started the process of grading the written tests right after they were administered. His job was to go through the tests and indicate whether an answer was entirely right, entirely wrong or partly right. He completed his part of the process before the oral test was administered to any applicant.

Mr. Polk then assigned a numerical score where Mr. Schulz had indicated that an answer was correct or partially incorrect; one point for a correct answer, half a point for a partially correct answer. Mr. Polk undertook his part of the process only after the oral part of the test was administered and he had compiled the results of the oral part of the test.

The written test, with the possible exception of Question Number 10, called for objective answers and did not allow the grader much leeway in deciding whether an answer was right or wrong. Both Mr. Chavez and Mr. Bowman answered Question Number 10 correctly.

I've examined Mr. Chavez's and Mr. Bowman's answers to the written test and I have compared them to the predetermined correct answers. I have also examined Mr. Schulz's grading marks and Mr. Polk's award of points. I am unable to arrive at

any finding other than a finding that the written exam was fairly and correctly administered, graded and scored. I do not see any evidence of prohibited conduct in this process itself. On the written test, indeed Mr. Chavez scored 10.5 points and Mr. Bowman scored 9 points.

I will make some findings, partly since there has been so much discussion on the matter, about the two last minute questions, namely the batter board question and the fifty-fifty question. Mr. Chavez claims that the batter board question was ambiguous, that he interpreted it correctly and that he should have received full credit for his answer. He implies, insofar as this is pertinent to this case, that he did not receive credit because Mr. Schulz knew of his identity and intended to discriminate against him.

After listening to both Mr. Chavez's and Mr. Schulz's testimony concerning this issue, I find the question to be unambiguous, Mr. Chavez's interpretation to be bizarre and his answer to be incorrect.

Additionally, all applicants answered the question incorrectly and Mr. Schulz marked them accordingly. I cannot conclude that this sequence of events evidences discrimination against Mr. Chavez.

Mr. Chavez also stresses that Mr. Bowman signed his initials to the fifty-fifty question while Mr. Chavez signed his entire name. The argument evidently is that I should infer, because City rules require the written test be scored in anonymity to preclude discrimination, this is, in the words of the case law, disturbing procedural irregularity which circumstantially evidences discrimination.

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The persuasive evidence does not support the inference that this episode evidences discrimination. Mr. Polk instructed applicants that they were to be tested according to number and were not to put their name on the test. He did all that he could to follow and enforce the City's rule.

Evidently confused, perhaps because this particular question was among the two that was added at the last minute by Mr. Schulz, both Mr. Bowman and Mr. Chavez answered in a way which might have permitted a person to identify them if that person cared to do so. They could have signed with their exam number and the City cannot be responsible for their failure to do so. To suggest that this can be taken as evidence of procedural manipulation to accomplish discrimination against Mr. Chavez is a peculiar argument, especially since the graders of the examination, Mr. Polk and Mr. Schulz, ended up scoring Mr. Chavez higher on this portion of the test.

In any event, Mr. Schulz says that he overlooked the identifying marks, and given the objectivity of the test, my finding that the test seems to have been scored fairly and Mr. Chavez's high score on the test, I cannot credit the contention that this problem of — this procedural problem is any circumstantial evidence of discrimination.

Although the memorandum announcing the test indicates that the oral test was supposed to occur on November 10th, I credit Mr. Polk's recollection that it was postponed for a day or so. His testimony was certain and he was able to articulate the reasons why he recalled the postponement of the oral exam.

The oral test requires each evaluator to rate each applicant's oral answers on a scale of two to ten. Five persons

did the evaluation in this instance. Answers to the questions on this exam are necessarily more subjective and leave more leeway for the evaluators than answers to questions on the written exam because skills under scrutiny are more intangible, skills such as judgment, managerial ability and supervisory skill. So I do not find in the use of this subjective test any — necessarily any necessary evidence of discrimination.

To the extent that the answers — to the extent that there were objective correct answers to these questions, the evaluators were aware of these answers in advance. There was no attempt to discuss an applicant's answers or to arrive at a consensus evaluation. Each evaluator awarded points without knowing what the other evaluators were awarding or doing.

The evaluators were chosen by Mr. Polk. They included Mr. Polk, chosen because he was the personnel representative in this entire process, Mr. Schulz, chosen because the vacancy was in his department, Mr. Luft who was then in the Engineering Department and later would have the job then held by Mr. Schulz, Mr. Deeds who was from the Water Department, and both of whom provided some expertise outside of the department — or the division in question in order to provide some independent input and, finally, the evaluators included Mr. Scott who was a Public Works employee with the neighboring city of Wheatridge.

The plaintiff suggests that Mr. Polk may have had a conflict of interest, but I perceive no basis for such a finding. Plaintiff also criticizes the appointment of Mr. Schulz, as to whom I will make more detailed findings in a moment.

The plaintiff does not, as I recall the evidence, mount any

serious — other serious attack on the composition of the oral testing board, and I find nothing in the evaluation process to evidence discrimination in the choice of evaluators.

The marks given by the oral evaluators for several specific answers vary widely, as counsel pointed out during their respective examinations. Those evaluations given by Mr. Schulz tended as a whole to be lower for both of the candidates, Mr. Bowman and Mr. Chavez, than those given by others. Part of what I infer from that is simply that he was a harsher or harder grader or evaluator than the others. But that's only a part of what I will infer, and I will get to the rest in a moment.

After the oral tests were completed, Mr. Polk tabulated and summarized the results of the oral exam. He then assigned points on the written test, which Mr. Schulz had previously graded, and then Mr. Polk combined the oral and the written scores.

According to the documents, Mr. Bowman obtained38.15 points on the oral exam, while Mr. Chavez scored 36.65 points. Combining both exams, Mr. Bowman and Mr. Chavez had identical scores of 47.15 points. Mr. Bowman was listed first on the eligibility list in accordance with established procedure because he had scored better on the more heavily weighted portion of the test, the oral portion.

Mr. Polk and the Personnel Director thereafter discussed the possibility of eliminating the high scores and the low scores for each of the two applicants' answer and averaging the remaining three, a step which they — which Mr. Polk I believe, or the Personnel Director, or both, testified is sometimes taken in an attempt to eliminate what I understand to be the most aberrational or the more aberrational evaluations in a test.

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As Exhibits L-1 and M-1 demonstrate, the result of this exercise would have widened Mr. Bowman's margin on the oral exam and broken a tie in the overall score. Mr. Polk and the Personnel Director decided not to do this and that decision was favorable to Mr. Chavez because it kept him tied. Thus, their discussion and this decision, this exercise, does not seem to me to be evidence which points either way on the issue of prohibited discrimination.

After the testing was completed, the Personnel Department supplied Mr. Culbertson, the appointing officer, with an eligibility list showing that all ten applicants possess the minimum qualifications to have the job.

Based on the test scores and weighing of the oral and written part of the tests, Mr. Bowman's name was first and that of Mr. Chavez was second. It was made clear to Mr. Culbertson, however, that their overall score on both parts of the test was tied.

Although Mr. Culbertson was technically permitted to choose anyone on the list, I infer that he quickly narrowed that list to Mr. Chavez and Mr. Bowman because when he sought Mr. Hammons' advice and Hammons suggested others on the list, Mr. Culbertson immediately told him that the choice was only between Bowman and Chavez.

In making his choice, Mr. Culbertson sought the recommendation of the division head, Mr. Schulz, who would be the direct supervisor of the successful candidate. He also sought the recommendation of the two candidates' then current direct supervisors. Mr. Hammons was the direct supervisor of Mr. Chavez, who was a senior equipment operator on the

sweeping and mowing crew at the time. Mr. Dick Beasley was the direct supervisor of Mr. Bowman, who was a senior equipment operator on the asphalt crew.

Mr. Hammons, who made an oral recommendation, initially chose Harry Muse and then Gary Lindauer, both white males. He recommended Muse, he testified, because he had more recent previous experience on the crew in question, and he recommended Lindauer when he was asked because he had — he, Lindauer, had more schooling.

When Mr. Culbertson reiterated that the choice was between Mr. Bowman and Mr. Chavez, Mr. Hammons selected Mr. Chavez because Mr. Chavez had more experience on the crew in question and more years of service with the City. Also, Mr. Hammons testified that he thought that Mr. Bowman seemed, I believe his words were something like a childish clown to him, and so he recommended Mr. Chavez.

Although Mr. Chavez suggests that Mr. Hammons initially recommended the two white candidates because he had a retaliatory motive, I do not find that contention consistent with a preponderance of the evidence, nor do I find it to demonstrate discrimination in this promotion decision since Mr. Hammons ultimately recommended Mr. Chavez.

The suggestion in question is premised on a statement which Mr. Hammons supposedly made to the Colorado Civil Rights Commission division investigator that Mr. Muse had earned his current position while Mr. Chavez had received his when his previous Civil Rights claim was settled. When the investigator's notes are considered as a whole, however, they show Mr. Hammons to have been stating what his

understanding was concerning a fact, and that fact is that Mr. Chavez received his current position when his previous Civil Rights claim was settled. That wasn't the exact fact, because what it appears that Mr. Chavez did receive was training to advance him — to help him advance to his current position of senior operator. But it appears to me that Mr. Hammons was simply stating his understanding of what the settlement was.

Mr. Hammons, in the same document, acknowledges that Mr. Chavez had proved himself on the job and was qualified. Mr. Hammons testified in court concerning his reasons for making his recommendations and these reasons seemed, on the whole, credible to me.

Furthermore, on the whole, as Mr. Beasley seems to have perceived in the conversations which Mr. Larry Stewart testified to in court, Mr. Hammons was doing things to advance Mr. Chavez. He wasn't against Mr. Chavez. And those things included informing Mr. Chavez of the opportunity to rotate into the draining and concrete crew, and suggesting that the opportunity might help him get the crew supervisor's job.

And, finally, in response or in dealing with the suggestion that Mr. Hammons had a retaliatory motive, it must be remembered that Mr. Hammons ultimately recommended Mr. Chavez when told that he must choose between Mr. Bowman and Mr. Chavez, and he expressed his reasons for doing so.

For those reasons, I cannot conclude that Mr. Hammons had a retaliatory motive or, in view of his choice of Mr. Chavez, that any motive of his, whatever it was, affected the ultimate selection, because the only input he had here was input in which he recommended Mr. Chavez to Mr. Culbertson.

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Mr. Beasley, for his part, recommended Mr. Bowman. His recommendation was oral. He did not testify in court and his reasons for making the recommendation did not seem to me to be very fully developed.

Mr. Culbertson gave the opinions of the supervisors unspecified weight in reaching his decision. He seems to have considered the two immediate supervisors' opinions to have been a wash since each one recommended his own worker. He, therefore, was left essentially, as far as recommendations are concerned, with the recommendation of Mr. Schulz who responded in writing and recommended Mr. Bowman. The writing does not express Mr. Schulz's reasons for recommending Mr. Bowman.

In addition to considering these recommendations, Mr. Culbertson developed five questions to be put to each of the two candidates in an oral interview. He recorded the questions and each candidate's responses in writing. Although Mr. Chavez believes that some of the answers attributed to him are incomplete, it appeared to me that he really did not remember and, therefore, I am in the position of crediting Mr. Culbertson's contemporaneously recorded writings since they seem to me to be the best evidence of the candidates' answers.

After interviewing each candidate, Mr. Culbertson selected Mr. Bowman. And in view of the importance of the reasons and the weight that he gave to all these various considerations in making his selection, I reviewed Mr. Culbertson's testimony.

He testified that he relied upon his own judgment as to who provided better answers to his questions. He relief upon the test

results as to which the candidates were scored but—the candidates were tied, but Mr. Bowman had an edge because of his higher score on the oral test. Mr. Culbertson also relied upon the supervisors' recommendations. He clearly stated that he examined all the information as a whole and that it was all considered equally—and that he considered it equally important to him in making his decision.

Although this finding is not in chronological order, I find that Mr. Chavez had, in 1977, filed a claim of discrimination with the Equal Employment Opportunity Commission claiming that the City was failing to train him for the position of senior equipment operator. The claim was settled and Mr. Culbertson (sic.) dropped the matter without proceeding further.

There is no persuasive evidence here that Mr. Culbertson himself as an individual employee of the City knew of this previous EEOC claim when he made the decision to promote Mr. Bowman over Mr. Chavez.

Mr. Chavez was, in February of 1990, promoted to supervisor of the street and mowing crew when Mr. Hammons retired. The application and testing process which led to this appointment was similar to the process already described. Mr. Chavez, as I understand it, received the highest score on the test and Mr. Culbertson made the decision to select him for the position. And as I understand it, this position is equivalent in grade, status and pay to the position of crew supervisor which is the subject — crew supervisor of the street and drainage crew which is the subject of — or the primary subject of this lawsuit.

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There is a considerable debate in the papers and in the evidence and in the arguments of counsel concerning a hostile work environment. I find from a preponderance of the evidence in this case that the evidence demonstrates hostility in the work environment, the work environment being the environment of the Streets and Draining Maintenance Division, and I find that that hostility is based on sex and national origin.

The hostility is long-standing and continuing, continuing up to a date less than a fortnight before the trial. Chronologically, the earliest evidence of this sort of hostility was the episodes concerning Mr. Bowman's remarks to Ms. Joann Clay back in 1979.

I reviewed my notes concerning that episode and my recollection confirmed by the notes is that initially, Mr. Bowman made sexual remarks, called Ms. Clay a bitch and he and Ms. Clay went in to see Mr. Schulz.

As I mentioned during the course of counsels argument, I was interested in Mr. Schulz's response to this because his response was, as he put it, to wrap both of them on the knuckles, I think was the rough term he used, and to say to Ms. Clay, "If you need training, ask him for it," and to say to Mr. Bowman, "And when she asks you for it, be sure to give it to her."

There doesn't seem to be any recognition on the part of Mr. Schulz that remarks such as this do have a sexual connotation, they are offensive to members of one's sex and that may have been because he received no training, no evident training in matters such as this, that is, matters of discrimination based on sex or national origin or race, because there is no evidence that the City provides any sort of training.

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There is evidence the City has an affirmative action policy that was adopted voluntarily and without any threat or pressure from anybody, but there is really no evidence that it is any more than lip service, something to have on the books of the City.

There is no evidence that supervisors, at least in this department, are trained or that they receive any education in the area of equal employment opportunity. And the result, perhaps predictable, is that when they are confronted with situations like this, they shrug it off, they treat it as an ordinary fight, they do not — they blame or they reprimand both parties and they make no — they take no disciplinary action, they make no notation anywhere in the records that this has happened. And, indeed, that's precisely what occurred here.

There is nothing in Mr. Bowman's record to indicate that this incident happened and that he used a term which has connotations of discrimination based on gender.

And in reviewing my notes, I further find that it didn't stop at that. Even after Mr. Kelly reprimanded him, there was a separate subsequent episode that occurred in 1980 when they were unloading salt when Mr. Bowman did the same thing and several people overheard it and Ms. Clay complained. And as far as I can tell, there was another meeting. There was an attempt to correct the situation, but it was not treated seriously again. There was no recording of a second offense by Mr. Bowman where he used this term.

It doesn't appear on his record, it doesn't appear anywhere in the records. It was, rather, treated as something that happens, something that there was a feeble attempt to deal with and to address and to prevent and which predictably, as most half-

hearted attempts like this, didn't really produce the desired result, because the next thing we heard is that there was testimony that Mr. Bowman used the same epithet directed at Ms. Dee Culbertson.

So that's really the beginning of what I — one could characterize as a sexually hostile environment. And no one of these acts I think would be significant standing all alone, but the continuation and continuity and persistence of the acts is what justifies a finding that there is a hostile environment.

Now, what I've mentioned so far has to do with an environment concerning gender discrimination. However, there is also evidence of not only racial discrimination, but also national origin discrimination.

Now, I recognize that anonymous notes that are left on car windshields and anonymous dogs that are hung somewhere standing alone would not necessarily prove that the City condones discrimination based on national origin or based on race.

What I do find peculiar is the City's — is the fact that it happens on City property and that it seems to be a part of an ongoing pattern of conduct and that nobody ever really attempts to do anything about it. And, of course, what I'm alluding to is the windshield that was left on Mr. Chavez's — or the note that was left on Mr. Chavez's windshield indicating that happiness is being an illegal alien and the fact when he brought this to the attention of his supervisor, his supervisor sort of shrugged it off and indicated that that's what happened and took no action. Again, this may have been because Mr. Hammons didn't have much training in these sort of issues, but the lack of training is a

predictable result of — or leads to this predictable result, which is that people with Mr. Hammons' education, Mr. Schulz's education and background, tend to shrug these matters off and think that people like Mr. Chavez should overlook them.

Of course, there is, as I've alluded to earlier, the latest act of discrimination, or indicating a racially hostile environment, I should say, with the hanging of the dog with Mr. Chavez's name on it. And, you know, the City takes the same attitude today basically that it has taken all along, and that attitude was exemplified by the current manager of the division, the street and maintenance division, Mr. Lund — Mr. Luft, I'm sorry, Mr. Luft. And the attitude is that no investigation needs to be undertaken, that it's a prank, it's a prank in poor taste, but — and part of the position is that it might not have to do with this Mr. Chavez.

I find that to be strained and I find the City goes to extraordinary lengths to look the other direction when things are done to this man. I find that that dog, because of the place it was hung and the situation in which it was hung, referred clearly to this Mr. Chavez and not to the other Mr. Chavez who is there, who is employed at the City.

Similarly, with respect to the instance where a sign is hung up concerning happiness being an illegal alien, sure, you can't tie that directly to the City, but it occurred when he was at the City, it's a part of what appears to be an ongoing pattern of what in the most benign interpretation is juvenile teasing and harassing of Mr. Chavez. And one might say that boys will be boys and girls will be girls and these are rough blue collar people, but that doesn't seem to me to justify the kind of conduct that has occurred here and I find that that conduct has an

underlying aspect of harassment based on national origin, and I find that not withstanding the fact that one of the harassers is a Hispanic. I don't know why Hispanics do that, but to me it doesn't justify that type of conduct any more because it comes from a Hispanic than when it comes from somebody else.

Since I have found that there existed an environment that was hostile to Mr. Chavez and it was hostile to him based at least in part on his national origin, Hispanic, the next issue that I have to consider is how this overall hostile environment affected the critical employment decision in question, if it affected that employment decision at all.

The plaintiff seems to suggest, relying upon the Tenth Circuit's decision in the *Calloway* case, that if a hostile environment is proven, that that is strong evidence of discrimination in an employment decision. I don't find that to be the case, and why I don't find it to be the case causes me to need to get into the law at this point because it has to do with Justice O'Connor's concurring decision in the *Price Waterhouse* case. So I'm going to discuss the law and then go back to the findings of fact, the additional findings of fact that I will make in a moment.

This does not seem to me to be a simply straight forward case involving circumstantial evidence of discrimination to which I can readily apply the analysis of *McDonnell Douglas* and its progeny.

McDonnell Douglas governs situations where a plaintiff attempts to prove a case of discrimination by circumstantial evidence. There is no direct evidence. An employment decision is made, it adversely affects a minority, there is an

articulated business reason for that employment decision and the question is whether that is the true reason or whether that is a pretextural reason. And, of course, in that situation, the courts are clear that ultimately it is the plaintiff who bears the burden of proving that there is discrimination based on a prohibited factor such as national origin or race or gender.

The Supreme Court in an age discrimination case has indicated that *McDonnell Douglas* is not an analysis that applies very readily when you've got direct evidence of discrimination. That is to say, *McDonnell Douglas* and its progeny provide a framework for analyzing the burden of proof and burden of going forward in circumstantial cases. *McDonnell Douglas* does not itself apply where there is direct evidence of discrimination.

In addition, *McDonnell Douglas* provides only an incomplete analysis in the so-called mixed motive cases. And the mixed motive cases are exemplified, at least at the Supreme Court level, by the decision in *Price Waterhouse versus Hopkins* reported at 109 Supreme Court 1775.

In reviewing *Price Waterhouse* and in discussing *Price Waterhouse* here, I recognize that it was a plurality decision concurred in by four justices, two of whom are no longer with the court, and I recognize that there were separate concurrences by Justice O'Connor and Justice White. Therefore, in discussing *Price Waterhouse*, I'm going to look out only at the majority's opinion, but also to Justice White's concurrence and to Justice O'Connor's concurrence. In fact, I'm going to look at those first because it seems to me Justice White provides the definition of what a mixed motive case is as opposed to a straight forward circumstantial evidence case that can be analyzed under *McDonnell Douglas*.

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Justice White, at Page 1795, says that "The court has made clear that mixed motive cases such as the present one are different from pretext cases such as *McDonnell Douglas* and *Burdine*. In pretext cases, the issue is whether illegal or legal motives, but not both, were the true motives behind an employment decision."

And here I might add, and I'm not quoting Justice White, that the typical pretext case that we see involves a single decision by a single person which is attacked as having an adverse impact and which is justified as being just compelled or required by some sort of business reason. And the question is whether from that circumstance and all the other circumstances, that is in fact a true reason or a pretextural reason.

Continuing on with Justice White then, he says, "In mixed motive cases, however, there is no one true motive behind the decision. Instead, the decision is a result of multiple factors, at least one of which is legitimate."

The plurality in that case analyzes the problem as being one of allocating the burden of proof. When a plaintiff proves that one of the prohibited considerations is a factor in the employment decision, then — is one among many factors, some legitimate and some illegitimate in the employment decision, then the burden of proof shifts, not just the burden of going forward, but the burden of proof under *Price Waterhouse* shifts to the defendant to demonstrate by a preponderance of the evidence that the same employment decision would have been made even if the improper or illegal factors had not been considered.

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Now, Justice White's and Justice O'Connor's concurrence makes that even clearer because both of them analyze the problem in terms of cause. Justice White says the proper approach to causation is determined by the court's prior opinion in *Mount Healthy City School District Board of Education versus Doyle*. And that was a case involving the First Amendment, and since the court didn't want to put somebody whose First Amendment rights had been violated in a better position than somebody who had not suffered any adverse employment decision at all, it utilized the following approach in allocating the burden of proof.

The burden is placed on the respondent to show that his conduct was constitutionally protected and that his conduct was a substantial factor, in other words, that it was a motivating factor in the board's decision not to hire him. The respondent having carried that burden, however, the district court should have gone on to determine whether the board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the prohibited conduct.

And, similarly, Justice O'Connor analyzes the issue as being one of tort causation and says that once a plaintiff proves that illegitimate criteria were a substantial factor in an adverse employment decision, the deterrent purpose of the statute, the Civil Rights statute, has been triggered. That is to say that is the kind of conduct that the Civil Rights statute is directed at, and that, in her mind, justifies shifting the burden of proof at that point to the employer to prove by a preponderance of the evidence that even if these two causes — these many causes, some legitimate and some illegitimate, had not combined, the result would have been the same with all legitimate causes of the employment decision.

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Now, how does *Price Waterhouse* apply here? As I've said, I don't see this as a circumstantial case of discrimination, and I'm somewhat hesitant in saying that because the plaintiff has somewhat pursued it as such a case by suggesting that really the factors that Mr. Culbertson relied on were pretextural and in fact Mr. Chavez was objectively much more qualified than Mr. Bowman and, therefore, the decision must have been pretextural because any objective observer looking at these facts would arrive at the conclusion that Mr. Chavez as more qualified.

I don't analyze the case in that way because I don't find that it is a pretext case. The difference between this case and the *Calloway* case is that in this case, there were tests administered and the se two men tied. And as far as Mr. Culbertson knew, he didn't have the details of the test, he didn't know how they were administered, he didn't know whether there were discriminatory factors that influenced the test; all he saw is that there were two people equally qualified.

Now, it's true the record doesn't reveal Mr. Bowman's lack of past discipline for making offensive remarks. In fact, he never appears to have been disciplined. It is also true that Mr. Chavez had more experience with the City in terms purely of years. Mr. Chavez also had more terms on the crew in question — or more years on the crew in question, just in terms of how long the two men had served on that crew. But I'm unwilling to say that it's pretextural for somebody to overlook mere seniority and mere longevity with a crew and to try to rely on a test which he thinks reflects the merit of the two candidates. And so I don't see the issue as being one of pretext at all. If the issue were one of pretext, I would have some difficulty concluding that Mr. Culbertson's decision here was a pretext for his unlawful employment discrimination.

There's no evidence that he treated other people any differently than he did Mr. Chavez. In fact, later when Mr. Chavez was the top applicant for the test, he promoted him. As far as Mr. Culbertson's individual intent here is concerned, there doesn't seem to be any evidence that he had a retaliatory — that he could have a retaliatory motive since he didn't know of the prior EEOC charge, and I see no persuasive evidence that he really was motivated by national origin discrimination.

Although as the plaintiff can point out, and as I have found, there is a good deal of racial hostility in the work place, the work place that we're talking about is the division that was headed by Mr. Schulz at the time and there's no evidence that Mr. Culbertson knows what goes on in the work place, that these things were reported to him and that he failed to take action, that he's a man who is tolerant of sexual discrimination and/or national origin discrimination. And so for those reasons, I don't analyze the case as a pretextural case at all, even though there's a lot of evidence from which I suppose the plaintiff would ask me to find pretext.

To my way of thinking, this case is a mixed motive case in the tradition, if you will, of *Price Waterhouse*. An employment decision was made that adversely affected the plaintiff and resulted in the promotion of a white employee. The decision was made by Mr. Culbertson, the Director of Public Works. Mr. Culbertson has testified as to all the factors that he considered in making that decision. One was the test, the written test and the oral test that had been previously administered, another factor was Mr. Hammons' decision, another factor was Mr. Beasley's decision, another factor was Mr. Schulz's decision, and another factor was the five question test, oral test, that Mr. Culbertson composed and gave to the two candidates. And on the basis of all of that, Mr. Culbertson decided in favor of Mr. Bowman.

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What I need to do then is examine all of those factors and determine if any of those factors are based on illegitimate prohibited discriminatory criteria.

First I look to the recommendation of Mr. Beasley. In effect, analytically here, Mr. Beasley had a small part in making this promotion because Mr. Culbertson considered his input in making the decision. Now, to be sure, Mr. Culbertson may have treated Mr. Beasley's decision as a wash, but I don't think that satisfies the requirement that defendant prove by a preponderance of the evidence that the same employment decision would have been made in the absence of that factor.

Well, what about Mr. Beasley? On the whole, he seems to have been favorable to Mr. Chavez. He recommended Mr. Chavez, although in sort of a backhanded way, after he had recommended others, and I cannot find that that — that the consideration of his recommendation amounted to consideration of an improper or prohibited factor.

Now, that leads me to Mr. Schulz. And Mr. Schulz is not as clear as Mr. Beasley in my mind, his motivation, and whether he was recommending purely on merit. I had an opportunity to review Mr. Schulz's demeanor on the witness stand and I had an opportunity to review not only the justification he advanced but also his administration of the oral exam. There was testimony to support the proposition that Mr. Schulz, while he may not have been motivated by racial animus or animus based on national origin, was motivated by a retaliatory animus, in that he was retaliating against Mr. Chavez for the filing of the previous EEO complaint. It must be remembered that Mr. Schulz was the head of the department at the time that Mr. Chavez filed this complaint.

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Mr. Schulz's demeanor to me was the demeanor of a man who is set in his ways. He is an elderly man. He brooks no nonsense. He is straight forward and I believe that he is the type of man who would be particularly sensitive to a charge that the City had discriminated against Mr. Chavez by failing to train him for a promotion.

There is other evidence of conversation which supports the attribution of a retaliatory animus to Mr. Schulz. There is evidence that Mr. Chavez approached him after the test and Mr. Schulz told him, "Oh, no, you're not going to pull that one again on me."

Now, of course that is disputed. Mr. Schulz denies that that happened, and I'm faced with a credibility question of who to believe on that particular point. I credit Mr. Chavez, not because I believe everything he said or not because I believe that he doesn't sometimes exaggerate or perceive things that aren't there, but because this seems to be something that is consistent with his character and mode of operation.

Mr. Chavez, it seems to me from a totality of the evidence, is one of those individuals who pushes things perhaps beyond where they ought to go, and an individual who might from time to time irritate reasonable persons including a person like Mr. Schulz.

Mr. Chavez testified in court that he thought he got the exam question right and it strikes me as credible that he go to Mr. Schulz and argue with Mr. Schulz about the exam question that Mr. Schulz composed and administered. And it doesn't strike me as improbable, in fact to the contrary, that Mr. Schulz would say wait a minute, you're not going to do that to me again,

and that he was referring to the fact that he was the supervisor in 1977 in the department when Mr. Chavez filed his previous complaint.

There is other evidence concerning Mr. Schulz, Mr. Schulz's retaliatory animus, the most interesting of which to me appears in the oral test and the way that the oral test was administered and Mr. Schulz's role in that oral test.

There was considerable discussion back and forth about how Mr. Schulz scored Mr. Chavez relative to how other scorers scored Mr. Chavez. There was discussion of comparing Mr. Chavez and Mr. Bowman and how Mr. Schulz scored the two of them. Now, some of that was inconclusive. On some occasions, I understood what Mr. Schulz was doing in making some precise and correct distinctions, and an example that I will give is he example where the question was who has the authority to impose discipline. Mr. Bowman said the upper supervisory personnel and named them, I forgot who they were. Mr. Chavez said the director of the streets and maintenance division.

Mr. Schulz property graded him down because the director of that division doesn't have authority to impose discipline; he has authority to recommend it. However, I've one through this question by question and there are questions where Mr. Schulz's grading is simply inexplicable. There are questions, two or three questions, where Mr. Chavez and Mr. Bowman give identical answers. Mr. Schulz grades Mr. Chavez (sic.) at an 8, I believe in one instance at a 10, although I don't recall as I sit here on the bench, and he gives Mr. Chavez 2's. And Mr. Schulz's explanation of that struck me as lame and late and incredible.

He said, "Well, maybe we had to coax Mr. Chavez and we didn't have to coax Mr. Bowman." The trouble is that doesn't explain the wide discrepancies that were given on those questions. And, to me, that's the clearest place that Mr. Schulz's retaliatory animus came in and it must be remembered that he was grading that question at a time when Mr. Chavez had evidently already challenged him on the written question. There's no question he knew the identity of Mr. Chavez; he knew the identify of all other people there. And I find that in his grading and scoring of the oral exam, not the written exam but the oral exam, the only inference I can draw is that Mr. Bowman (sic.) was discriminating against Mr. Chavez and that he was doing it with a retaliatory animus, that is, he was doing it mindful of the fact that Chavez had previously filed an EEO complaint and resentful of the fact that he had previously filed that complaint. I see no other basis on which you can reconcile some of the scores that he gave to Mr. Bowman versus Mr. Chavez, and it's not sufficiently explained merely by a finding that he's a tough grader because that doesn't explain the score that he gave Mr. Bowman.

So the conclusion that I arrive at with respect to Mr. Schulz is that Mr. Schulz was motivated by retaliatory animus, that there is direct evidence of that retaliatory animus in several respects, and that was one of the factors that Mr. Culbertson considered, the recommendation of Mr. Schulz. And in this instance, it couldn't be a recommendation that was a wash, as was arguably the case with respect to Mr. Hammons and Mr. Beasley. In this case, the recommendation of Mr. Schulz had some weight.

Mr. Schulz affected this process in one other way, and that is, returning to the administration of the oral exam, in the

grading of that exam itself. His participation in the exam, while I've found that it was not discriminatory per se for a person in his position, the superintendent of the streets and drainage division, to participate, there's nothing wrong with that, his participation and the fact that he allowed his retaliatory animus to be demonstrated significantly affected the results of the oral exam.

Now, specifically, in going through, my finding based on looking at Exhibit L, Exhibit M and L-1 and M-1, is that if Mr. Schulz's scores of these two men had been taken out, Mr. Chavez would have scored 39.2 points on the oral exam, Mr. Bowman would have scored 39.9 points, and that further indicates, by the way, that Mr. Schulz was clearly making some sort of distinction between Mr. Chavez and Mr. Bowman because Mr. Chavez rises more when those results are taken out than Mr. Bowman does.

In any event, when you combine the written and the oral without Mr. Schulz's input, Mr. Chavez receives an overall score of 49.7, Mr. Bowman receives an overall score, according to my findings and calculations, of 48.9, meaning without Mr. Schulz, Mr. Chavez was the overall high score even though he scored slightly lower by some seven tenths of a point on the oral examination.

Now, maybe that would have meant that Mr. Bowman would still be first on the list having scored higher on the oral, but at least without Mr. Schulz, Mr. Chavez would have been the higher overall score, or the highest overall score. And, therefore, I find that Mr. Schulz's animus, retaliatory in nature, infected not only his recommendation to Mr. Culbertson, but infected the very test which supposedly provided objectivity to this process.

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What we end up with then, or what I end up confronting is this situation. Mr. Culbertson himself may not have intended to discriminate, may not have been motivated by a retaliatory animus, but he considered several factors, some of which were discriminatory and improper, others of which were perfectly proper. I, frankly, find nothing improper about his own scoring of his own oral test. He made a case that I find is persuasive that Mr. Bowman scored better on that test, and I'm not going to interfere with his judgment as to that test alone. But he also gave some weight and some unspecified weight to these other improper factors.

And I find that plaintiff has proven by a preponderance of the evidence that these factors were a substantial part of the employer's decision. The test results themselves must have been important because they were the objective results. Mr. Culbertson testified that he considered them. In fact, when you look at this, the only proper factors that he ended up considering were his own test scores on his own personal oral test and the recommendation of Willis — the name is escaping me now — Willis Hammons, Mr. Chavez's direct supervisor. Everything else was infected by some form of prohibited discrimination.

Therefore, my finding or conclusion, if it's a legal conclusion, under *Price Waterhouse* is that defendant had the obligation to prove that the decision would have been the same absent consideration of the improper factors, and that is why I went over the testimony of Mr. Culbertson so carefully. I do not believe that that burden has been discharged. There has been no showing that Mr. Culbertson's decision would have been the same had you thrown out the recommendation of Mr. Schulz, had you thrown out the results of the oral test, and ad you thrown out the recommendation of Mr. Beasley.

And for that reason, I find that the plaintiff has satisfied its burden of demonstrating — his burden, I should say, of demonstrating that the employer's discriminatory motivation was a substantial factor in this adverse employment decision, and I find that the plaintiff is entitled to prevail.

Now, I will add one thing concerning *Price Waterhouse. Price Waterhouse* on the facts is a little different from this case. On the facts, the partners of Price Waterhouse had made recommendations about this lady, Ms. Hopkins, and some of them had been proper considerations and some of the recommendations were — indicated some improper consideration, and all of this was disclosed and all of it was on the table before the decision maker and the admissions committee.

It is true in this case that the improper factors were sort of under the table. Mr. Culbertson didn't know about that. They weren't in some kind of a writing before him. He didn't have a recommendation that he could say, well, there's some proper factors and some improper factors here. I do not think that makes any difference under appellate, circuit decisions before *Price Waterhouse.*

In particular, I point to Justice O'Connor's concurrence in *Price Waterhouse* in which she analyzes those decisions, and I point to one of the decisions she cites, *Field versus Clark University,* a First Circuit case from 1987 reported at 817 F.2d 931 in which a woman professor had been denied tenure based on a vote of the department. The department, the court found, was permeated with sexual discrimination. In fact, one teacher had — one professor had made a sexual advance and when she rejected the advance, he warned her that this was not a way to

get tenure. Now, I cite that case because this demonstrates that — or I assume that all of that was not on the table for the decision maker, that is, they didn't know he had approached her and she had turned him down.

It seems to me, therefore, that it's an insignificant factual distinction to say that in *Price Waterhouse*, the improper factors plus the proper factors were all on the table. That's not necessary to invoke the analysis that is required by *Price Waterhouse*. All the plaintiff has to prove is that there were improper factors that the decision was based on and that they were a substantial factor in the decision. At that point, the burden of proof changes.

Now, I believe the one additional finding that I need to make concerns the episode in 1987 where Mr. Schulz supposedly denied Mr. Chavez an opportunity to interview temporary employees when he had previously granted Mr. Bowman that same opportunity. I find that that is not a discriminatory act. The fact is at the time that the employment decision — the decision to permit Mr. Bowman to interview those employees had already been made, those employees had already been hired, there were no temporary employees to be hired and, therefore, it was perfectly proper to tell Mr. Chavez there were no more people to be interviewed, therefore, you can't do the interviews.

I'm a little skeptical because Mr. Schulz specifically hedged by saying he wasn't going to be there next year, but possibly you'd be able to do that. But, nevertheless, I'm unable to find that that is an adverse employment decision based on discrimination.

So the only adverse employment decision I find here is the November 8th, 1987 — November 18th, 1987 promotional decision, and I find that was impermissibly infected with retaliatory motives and discriminatory motives.

Now, the question remains as to the remedies. I don't believe that the plaintiff is entitled to an injunction requiring the City of Arvada to train this man because those aren't the violations that I've found. I do believe that this gentleman is entitled to back pay. And after we were here yesterday afternoon and I insisted on some definite figure so that I could figure out damages, I ran out of time to figure out what the damages were today.

It seems to me the parties ought to be able to arrive at a damages figure. My intent in awarding damages is that Mr. Chavez should receive the 2,347 a month that he would have received had he been promoted, less what he did actually receive. In addition, he should receive the benefit of expected raises in the position to which he should have been promoted, and of course if he got any raises from time to time in his current position, that should be deducted. And also he Court must deduct what he received when he finally received the promotion, which as I understood his testimony basically put him 5 per cent back of where he would have been.

I'm going to ask the parties to get together and see if they can stipulate as to damages. If they can't, I'll figure it out. You should just notify me we can't stipulate; somebody, you can file a joint statement or a separate statement saying we can't stipulate as to the amount of damages, and I will go through because I do have the notes, I just haven't had time to put pencil to paper and calculate the exact damages.

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In addition, as per the statute, the plaintiff is entitled to his attorneys fees upon proper proof of those fees. I would suggest that we follow the procedure I usually do, which is that the plaintiff will submit some sort of documentation to the Court and to opposing counsel concerning the amount of those fees, and you should do that by — oh, we're going to run into the Christmas holidays.

Are you going to be away during Christmas, Ms. Woodard? All right, why don't you do that by January 3rd. And then I will give the defendant until January 13th to reply, and if a hearing is necessary after reviewing that material, I'll set a hearing on the question of attorneys fees to determine reasonableness and amount and so forth. It occurs to me that there is at least one additional finding that I need to make, and that concerns the applicability of the Civil Rights Act of 1991. I find that it does not apply. I've reviewed the Act and I've reviewed the legislative history, and it appears to me that neither I nor Congress understand whether it's retroactive.

In that state of affairs where it is not clear, I'm going to apply the presumption that Judge Tahar articulated in the *Divargas* decision, and that is the presumption that the Act is not retroactive. If Congress wants to make the Act retroactive, then it's going to have to do so in language clearer than a statement that "Except as otherwise provided, this Act and the amendments made by this Act shall take effect upon enactment." It is easy for Congress to add the statement "and shall apply to all pending cases," or something similar, and until it does so, I'm going to apply the presumption against retroactivity.

I don't have time — or I don't want to take the time to

elaborate on the reasoning any further than to cite Judge Babcock's decision in *Hansel versus Public Service of Colorado*, a decision that he filed yesterday, 88 B 853, District of Colorado, December 11th, 1991 in which he arrives at the same conclusion and basically goes through the same analysis I would go through if it weren't 6:20 p.m. in the evening.

All right, Ms. Woodard, are there any findings that I have overlooked from the plaintiff's point of view?

MS. WOODARD: Yes, Your Honor, I would ask whether or not you intend for the City to retroactively correct the records to reflect the promotion as of November 18th, 1987.

THE COURT: Yes, I will require the City to retroactivity reflect Mr. Chavez's employment records to reflect that.

All right, any other finding that the plaintiff suggests?

MS. WOODARD: With the back pay, you do intend to include interest?

THE COURT: Yes, that is awardable, isn't it.

MS. WOODARD: Yes.

THE COURT: Yes. I hope you can agree on the interest.

All right, obviously I'm not going to enter the judgment until I receive the stipulation. Now, as to this first stipulation concerning back pay and damages, I want that before Christmas so we can get the judgment entered in this case, and then attorneys fees can wait until a later time. But that should be submitted by the 23rd of December, the material on back pay.

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Mr. Halaby or Mr. Scherling, are there findings that I have overlooked from the defendant's point of view or areas that I have overlooked?

MR. HALABY: Just a clarification, and I don't know if this is an appropriate clarification.

In terms of the Court's findings, was it central to finding that Kelly Schulz was the supervisor of the plaintiff in 1977 when the EEOC complaint was filed?

THE COURT: No, it wasn't because there was evidence that Mr. Schulz knew of the EEOC complaint whether or not he was the supervisor. I had understood, and maybe misunderstood, that Mr. Schulz was in this position at that time, that is, he was in — he was superintendent of the streets and maintenance division. But if he wasn't, my recollection of his testimony is that he was aware of the fact that plaintiff had filed such a grievance, and he seems to have harbored a resentment of that fact.

All right, anything else from the defendant's point of view?

MR. HALABY: No, Your Honor.

THE COURT: All right. In that case, Court will be in recess. (6:26 p.m. - Whereupon, the hearing was concluded.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

January 10, 1992

Appendix E

s/ Mary C. Chevalier
J. Ford/& Associates, Inc.
991 Ursula Street
Aurora, Colorado 80011
(303) 364-5776

(2)

No. 96-618

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In The

Supreme Court of the United States

October Term, 1996

GARY CHAVEZ,

Petitioner,

v.

CITY OF ARVADA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

THEODORE S. HALABY
Attorney of Record
ROBERT M. LIECHTY
HALABY CROSS
LIECHTY & SCHLUTER
1873 South Bellaire Street
Suite 1400
Denver, CO 80222
Telephone: (303) 691-5300

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

7 pp

QUESTION PRESENTED

Whether this Court should accept *certiorari* review over a Title VII retaliation case which concerns solely the sufficiency of evidence necessary to prove retaliation.

STATEMENT OF THE CASE

The facts are correctly set forth by the Tenth Circuit, reproduced in petitioner's appendix B, pp. 4a-12a. For purpose of this Court's review, the pertinent parts are summarized as follows:

Petitioner Chavez was a long-time employee of the respondent City. He claimed that in 1987 he was discriminated against when he was not promoted. Two years later the same decision maker promoted him to a position in 1989 equal to that which Chavez sought in 1987.

Mr. Chavez claimed discrimination on two grounds. First, he claimed that a Mr. Schulz, in making recommendations to the decision maker (Mr. Culbertson[1]), retaliated against petitioner Chavez because Mr. Chavez had made an EEOC complaint 10 years earlier in 1977. The trial court premised its judgment against the City solely upon this claim of alleged retaliation.

Mr. Chavez also claimed that there was a racially hostile environment. The district court specifically found that any alleged hostile environment had little to do with Mr. Culbertson's decision not to promote Mr. Chavez in 1987. The Tenth Circuit correctly noted: "the district court rejected Chavez' suggestion that the hostile work environment was 'strong evidence' of discrimination when he was passed over for a promotion. . . . " Petitioner's appendix, p. 8a. The district court's judgment was premised upon being passed over for the promotion, not upon any injury from the hostile environment. Thus, petitioner's references to racial discrimination interspersed

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[1] The district court found that Mr. Culbertson was not motivated by discriminatory animus; his only fault was in relying on factors that Mr. Schulz purportedly infected with such animus. *See* petitioner's appendix, p. 53a.

throughout his petition are completely irrelevant to the claimed injury.

The nub of the Tenth Circuit's holding (*see* petitioner's appendix, p. 14a) is purely an evidentiary matter. The district court found that after Mr. Schulz had administered the written test (which the district court found he had fairly administered and scored (*see* petitioner's appendix, p. 29a)), that Mr. Schulz and Mr. Chavez had a confrontation concerning how the written test had been scored and Mr. Schulz stated, " 'oh, no, you're not going to pull that one again on me.' " *See* petitioner's appendix, p. 49a. Mr. Schulz denied making the statement but the district court found he had said it. *Id.* The district court concluded that this statement, "you're not going to pull that one again on me," reflected Mr. Schulz' state of mind when he improperly graded the oral exam (Mr. Schulz was one of three oral examiners). Thus, the court found that Mr. Schulz' oral test score was a result of retaliation for petitioner's 1977 complaint. *Id.*, p. 51a.

As a result of Mr. Schulz' lower score on the oral exam, Mr. Chavez remained in a virtual tie with another employee seeking the promotion. Consequently, when the list of the finalists was sent to the decision maker (Mr. Culbertson), Mr. Culbertson determined that he had to choose between Mr. Chavez and the other applicant. Mr. Culbertson then did his own interview and considered recommendations from three people, one of whom was Mr. Schulz. On the basis of this second phase of the promotion process, Mr. Culbertson chose the other applicant. The only discrimination regarding the entire process was Mr. Schulz' input into the process.

The Tenth Circuit reversed upon one ground: that the statement "you're not going to pull that one again on me" was insufficient to show the necessary retaliatory animus.

See petitioner's appendix, p. 14a. The Tenth Circuit noted that "[t]he statement itself is in our view equivocal; whether it refers to the 1977 episode or something occurring in the intervening 10 years is pure guesswork. But for that one bit of evidence, the City, under the described circumstances, would have to prevail. And that short utterance attributed to Schulz by Chavez is not enough to change the result." *See* petitioner's appendix, p. 16a. Because there was no other evidence of retaliation, the Tenth Circuit reversed the district court's judgment and directed that judgment be entered in favor of the City. *Id.* p. 16a.

ARGUMENT

The matter presented to this Court is solely a question regarding the sufficiency of evidence to prove a retaliation claim, which issue does not require the attention of this Court. Nothing more need be said because the evidentiary issue was the dispositive issue decided by the circuit. Nor is the matter one arising under ***Anderson v. Bessemer City,*** 470 U.S. 564 (1985), in which a circuit court employed the wrong standard of review in determining that a trial court's findings were clearly erroneous. The circuit court was clear in its holding: the only evidence upon which the claimed retaliation was based was insufficient to prove retaliation. Therefore, once this evidence was discarded, there could be no discrimination and, hence, judgment properly entered in favor of the City.

Petitioner represents that there is a split of authority on the evidentiary issue. *See* petition, p. 6. That is not the case because there is no other circuit that has addressed the issue regarding sufficiency of the evidence in this context. In fact, the case that petitioner cites for the split in authority (***Booth v. Birmingham News Co.,*** 704 F.Supp.

213, 216 (D.Ala. 1988), ***aff'd without opinion,*** 864 F.2d 793 (11th Cir. 1988), ***see*** petition, p. 7) stands for the opposite proposition. In ***Booth,*** the plaintiff attempted to prove retaliation by having the court presume that the short length of time between the adverse employment decision and the protected conduct demonstrated the necessary retaliatory intent. The district court stated that it would not apply any such presumption but that plaintiff needed to prove the causal connection. ***See also Collins v. State of Illinois,*** 830 F.2d 692, 704 (7th Cir. 1987), cited on page 8 of the petition, discussing whether closeness in time raises a presumption of retaliation and holding that it was for the jury to decide. Such a claimed presumption based on closeness in time is a far cry from the Tenth Circuit's holding in the instant case which states that a ten-year gap in time, without any other hint of retaliatory motive, is insufficient evidence to raise a presumption of retaliation.

Petitioner also argues throughout his petition that when the district court found that Mr. Schulz actually said "you're not going to pull that one on me again," that this was direct evidence of retaliation. ***See, e.g.,*** petition, p. 7. However, the Tenth Circuit found that because of the 10 year gap, it was mere speculation to characterize this as evidence of retaliation, be it direct or indirect. The Tenth Circuit correctly noted that "[t]he statement itself is in our view equivocal; whether it refers to the 1977 episode or something occurring in the intervening 10 years is pure guesswork." ***See*** petitioner's appendix, p. 16a. The Tenth Circuit also noted that "there is nothing in the record before us to indicate that there was continuing friction between the City and Chavez from 1977, the year of the protected activity, and 1987, the year of the adverse employment action." ***Id.,*** p. 14a. In short, the district court made a leap of faith that was not merited on the

facts of this case and the Tenth Circuit reversed on evidentiary grounds only. There is no reason for this Court to interfere with this straightforward evidentiary matter.

Finally, petitioner argues that the Tenth Circuit erred because it did not remand the matter for consideration as to whether petitioner would prevail under the *McDonnell-Douglas* test. *See, e.g.,* petition, p. 9. Petitioner completely misunderstands the nature of the evidentiary question. When the Tenth Circuit found that there was insufficient evidence that Mr. Schulz' actions in 1987 were retaliation for the 1977 incident, the circuit court found that plaintiff could not prevail on the retaliation claim, no matter what the theory of proof. Consequently, when petitioner argues that he needs a second opportunity to try to prove his case under the traditional burden shifting test of *McDonnell-Douglas Corp. v. Green,* 411 U.S. 792 (1973), that issue became moot by the fact that there is no evidence of retaliation. Ultimately, a plaintiff bears the burden to show discrimination, *see, e.g., St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 511 (1993), which petitioner herein cannot do under any theory of proof.

CONCLUSION

For these reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

THEODORE S. HALABY
Attorney of Record
ROBERT M. LIECHTY
HALABY CROSS
LIECHTY & SCHLUTER
1873 South Bellaire Street
Suite 1400
Denver, CO 80222
Telephone: (303) 691-5300

Attorneys for Respondent